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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No.

BOARD OF TRUSTEES OF THE GALVESTON WHARVES AND THE CITY OF GALVESTON, TEXAS, *Petitioners,*

v.

UNITED INDUSTRIAL WORKERS OF THE SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICT, MARINE ALLIED WORKERS DIVISION, AFL-CIO, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, the Board of Trustees of Galveston Wharves and the City of Galveston, Texas, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-captioned case on August 8, 1968.

CITATIONS TO OPINIONS BELOW

The original opinion of the United States District Court for the Southern District of Texas, rendered September 11, 1964, is unreported and is reprinted herein as Appendix B. The first opinion of the Fifth Circuit Court of Appeals, dated September 14, 1965, appears at 351 F.2d 183 and is reprinted as Appendix

C, *infra*. The second opinion of the District Court, dated June 20, 1966, is unreported and is reprinted as Appendix D, *infra*. The second opinion of the Fifth Circuit rendered November 16, 1966, appears at 368 F.2d 412 and is reprinted herein as Appendix E. The third and fourth opinions of the District Court (the latter upon reconsideration), dated March 20, 1967, and May 3, 1967, respectively, are unreported and are reprinted herein as Appendices F and G. The third and final opinion of the Fifth Circuit, dated August 8, 1968, appears at 400 F.2d 320 and is reprinted as Appendix H, *infra*.

JURISDICTION

The opinion of the Fifth Circuit was rendered on August 8, 1968. On August 21, 1968, petitioners filed a timely petition for rehearing in the Fifth Circuit. The petition was denied on March 13, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

Section 2(7) and 6 of the Railway Labor Act, 45 U.S.C.A. §§ 152, seventh, and 156; and 28 U.S.C. § 2283, are set forth in Appendix A, *infra*.

QUESTIONS PRESENTED

1. A labor dispute arose between a union and an employer (the City of Galveston, Texas) over the layoff of employees as the result of a lease of the employer's facilities. The employer obtained a state court injunction prohibiting the union from inducing city employees to engage in work stoppages. The question is whether in the face of 28 U.S.C. § 2283 a Federal District Court, prior to the completion of the bargaining process ordered by the court, may enjoin the use of the

state court injunction on the theory that the union's right to strike is implicit in the District Court's order and necessary to "effectuate" that order.

2. The employer laid off its employees pursuant to a provision in its Agreement with the union relating to layoffs and also under a management prerogative clause in the Agreement. The question is whether the Court of Appeals may designate the dispute as a "major" one and award backpay to the employees without prior recourse to any administrative agency, including the Railroad Adjustment Board or a system board of adjustment specifically designated by statute for the awarding of backpay.

STATEMENT

Petitioner, Galveston Wharves ("Galveston"), is an adjunct of the City of Galveston, Texas. It is the owner and operator of dock facilities at the Port of Galveston. As to some of its activities, it is deemed a common carrier by rail under the Interstate Commerce Act. Prior to August 1964, one of these facilities was Elevator B, a shipside public grain elevator which for several years had been losing money.[1]

On October 1, 1960, a collective bargaining Agreement became effective between Galveston and the respondent union ("SIU"), which had been certified as the collective bargaining agent for all grain elevator workers employed by Galveston at Elevator B. By stipulation, the parties in 1963 extended the Agreement for a one-year period through September 30, 1964.

On July 7, 1964, following several weeks of widespread publicity in the city's newspapers, Galveston leased its previously unprofitable operations at

[1] *United Industrial Workers*, 170 N.L.R.B. No. 158 (April 12, 1968). The Board's opinion is reprinted as Appendix I, *infra*.

Elevator B to the Port Richmond Elevator Company, to become effective on August 1, 1964. Despite this, on July 20, 1964, SIU served notice that it wished to reopen negotiations on the Agreement.

Galveston had entered into the lease in conformity with two provisions in the Agreement:

(a) Article XVI of the Agreement provided that "Seven calendar days' notice must be given employees that are to be laid off with notice also being given to the Union." On July 23, 1964, nine days prior to the effective date of the lease, Galveston gave its employees and SIU the formal notice required by this clause.

(b) Article XII of the Agreement granted Galveston broad management rights. Thus, it preserved to Galveston "the management of the Elevator and the direction of the working force, including, but not limited to the right to hire, suspend or discharge for good cause, to assign the jobs to transfer employees within the Elevator, to increase and decrease the working force, to determine the products to be handled, the schedules of operation and the methods, procedures, means of handling."[2]

When Port Richmond took over the properties on August 1, it advertised in the local newspaper asking former employees of Galveston to apply for employment. The parties to a subsequent NLRB proceeding stipulated that all employees in the SIU unit (some 40 or so) then received letters from Port Richmond stating that its employment policy was to accept applications "from all prospective employees, including, of

[2] These contract provisions, in turn, were permissible under § 2, par. 7 of the Railway Labor Act, 45 U.S.C.A. § 152, seventh, which allows changes in working conditions in the manner prescribed in collective bargaining agreements.

course, those formerly employed by the Galveston Wharves." Applications were made available at the Elevator. The NLRB found: "It is undisputed that only one of the total SIU complement filed an application and he was hired." *United Industrial Workers, supra* n. 1.

Although Galveston had acted in full compliance with its labor Agreement, and Port Richmond had assumed control of Elevator B, SIU on July 29 served on Galveston what it claimed was a "section 6" notice requesting negotiation of all matters affecting wages, hours and working conditions covered by the existing contract. It also proposed a clause in any future contract relating to shut-down, leasing or sub-contracting. Several meetings between Galveston and SIU followed, at which it was agreed to arbitrate the grievance as to the men laid off. Even though each party designated its representatives to the System Board of Adjustment, SIU, as the Fifth Circuit noted, "has taken no steps since to prosecute or process the Adjustment Board hearing" (351 F.2d at 186 n. 12). Instead, on July 31, SIU began picketing the entire Galveston Wharves premises.[3] On the same day, it brought this action under the Railway Labor Act against Galveston and Port Richmond (since dismissed as to the lessee). It sought an injunction against consummation of the lease or any operation under it pending exhaustion of the Railway Labor Act machinery, and also restoration of the prior status quo. It alleged that Galveston should have given thirty days' notice of its layoff under § 6 of the Railway Labor Act, which provides for such notice "of an intended change *in agreements*

[3] The picketing was limited to the Elevator B area after Galveston obtained a temporary restraining order from a state court.

affecting rates of pay, rules, or working conditions * * *" (45 U.S.C.A. § 156; emphasis added).

The District Court denied a temporary restraining order and, after a hearing on affidavits and documents, denied a preliminary injunction. App. B. The District Court specifically held: "The Court classified this controversy as a minor dispute due to the fact that the resolution of the issues involved will depend upon the interpretation of an existing agreement," and relied upon a recent Fifth Circuit case which had so held. *St. Louis, S.F. & T. Ry.* v. *Railroad Yardmasters,* 328 F.2d 749 (1964).

On appeal, the Fifth Circuit conceded that the lease had been "non-discriminatorily motivated" (351 F.2d at 184; App. C). Nevertheless, it held that the Agreement, even by "reasonable implication," did not afford "some arguable basis" for what Galveston had done (*id.* at 188); that Galveston "terminated the contract by going out of business" (*id.* at 189);[4] that there had

[4] The court's inconsistency and confusion are illustrated by its treatment of this point.

In arguing that what petitioner did could not possibly be called a "layoff", the Court said that during the term of the contract, petitioner "terminated the contract by going out of business. * * * Nothing in this record even remotely suggests that this was a temporary layoff * * *. This was it—final, positive, all washed up" (*id.* at 189). Yet at another point in the same opinion the court stated that petitioner "has made a lease of limited duration" (*id.* at 187) and that petitioner "did not go out of business. Its lease, as leases of large industrial properties go, is short termed indeed" (*id.* at 191).

As pointed out below, the union itself has repeatedly referred to the treatment of these employees as a "layoff" or "laying off." And in one brief it told the court: "* * * Appellees [Galveston] refer to the lease as 'long-term.' But this is a euphemism—since the record is clear that it was a five-year lease" (Brief before the Fifth Circuit dated November 18, 1965, p. 7).

thus been "an intended change *in agreements* affecting rates of pay rules, or working conditions" under the Act (emphasis added), and that the Railroad Adjustment Board therefore had no jurisdiction. Galveston, said the court, should have given thirty days' notice under § 6 of the Act. Since it had "so clearly violated" the employees' rights, "some suitable relief and sanction should be imposed so that bargaining about this operational termination" could go forward (*id.* at 191-192). The case was remanded.[5]

Judge Bell dissented from that part of the opinion which related to Galveston. Stating that he had "looked in vain for some foundation for the [majority's] holding," he concluded:

> The dispute necessarily turns on a construction of these provisions [in the Agreement] to determine whether the carrier acted within its rights. This is a classic example of a minor dispute which under the law is to be handled by the Railway Adjustment Board [351 F.2d at 192.[6]]

In the meantime, Galveston had sought and obtained from the District Court of Galveston County, Texas, an injunction which prohibited SIU members from picketing. The original basis for the injunction was

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[5] SIU twice filed unfair labor practice charges against Port Richmond, and both times they were dismissed. However, when Port Richmond filed charges against SIU, the NLRB took jurisdiction and obtained an injunction against SIU picketing of Port Richmond.

[6] Additionally, he pointed out that even if this were a major dispute, § 6 of the Act might well be inapplicable if the cessation of the elevator business had been bona fide. He added, as the majority had conceded, that "There is not a whisper in the record of the elevator having been leased because of anti-union animus" (351 F.2d at 193).

the "no strike" provision in the contract, which prohibited strikes or picketing during the life of the contract. Later an amended petition was filed in the State Court which changed the basis of the injunction to Art. 5154C of the Texas Revised Civil Statutes, which makes illegal any picketing designed to induce city employees to engage in work stoppages.

On remand from the Fifth Circuit, the Federal District Court ordered the parties to bargain in good faith. It refused, on the grounds of hardship, to return the parties to their pre-lease status, it denied an SIU request for backpay, and it refused to modify the injunctions against picketing it had issued against SIU at the behest of the NLRB (see n. 5, *supra*). App. D. On Appeal for the second time the Court of Appeals approved the refusal to modify the injunctions, but it remanded the case for the imposition of "some suitable relief and sanction" that would have the effect of restoring the status quo prior to the lease. 368 F.2d 412; App. E.

On several occasions thereafter the parties informed the District Court that they were negotiating a settlement of their differences. Then, as the District Court later found, the settlement negotiations were broken off by SIU, which filed a petition for interim relief and sanctions. The District Court at first granted backpay and denied SIU's request to enjoin Galveston's use of its state court injunction. App. F. On reconsideration, however, the court reversed itself, ordered reinstatement of the laid off employees, but denied the union's claim for backpay on the ground that only the Railway Adjustment Board could grant such relief. At the same time, the court enjoined

Galveston from using the injunction it had obtained from the state court. It did so on the ground that the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.* was applicable to this case. App. G.

In its prior opinion, the Court of Appeals had stated that "We do not blueprint these matters. They are best left to the discretion of the District Judge" (351 F.2d at 192). Despite this statement, the appellate court now reversed the District Judge's discretionary decision and ordered the award of backpay. It did so even though SIU's original complaint had not even sought backpay, SIU had not cited a single case or a single statutory provision supporting such an award,[7] and the court itself conceded that "no case has been found where a federal court has awarded backpay as part of its enforcement of the status quo in a major dispute." 400 F.2d at 327; App. H.

The Court of Appeals also approved the enjoinder of any use by Galveston of the injunction it had obtained from the Texas court. It disavowed the reasoning of the District Court, pointing out that Galveston is a sovereign arm of the State of Texas and therefore immune from the Norris-LaGuardia Act. The court instead approved the federal injunction on the ground that the union's right to strike was "implicit" in the court's order, and the injunction was thus necessary "to carry out" or effectuate the District Court's bargaining order.

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[7] In fact, SIU conceded: "Similarly, it is true we are unable to find a case in which a Court has ordered payment of backpay against a carrier for breach of statute" (Brief before the Fifth Circuit dated November 1967, p. 3).

REASONS FOR GRANTING THE WRIT

A. The Injunction Against State Action Violates the Controlling Federal Statute and Conflicts With Decisions of This Court and Other Circuits.

The decision below—that under the circumstances of this case a federal court can enjoin Galveston from giving effect to a state court injunction against picketing—violates § 2283 of the Judicial Code, conflicts with decisions in other circuits as well as in the Fifth Circuit itself, and contravenes the holdings of this Court.

The Court of Appeals recognized that 28 U.S.C. § 2283 defines the limited area in which it can act. That section provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

This language embodies a clear congressional mandate that, absent the specific exceptions noted in the section, the federal courts do not have power to enjoin proceedings in state courts. *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U.S. 4, 8-9 (1939).[8]

The Court of Appeals conceded that no Act of Congress authorized its injunction,[9] and that no injunction

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[8] This case dealt with the predecessor § 265, but the Court's comments are equally applicable under the later section.

[9] The section requires that a statutory exception be "expressly" authorized. The former restriction, which applied only to actions under the federal bankruptcy laws, was generalized to cover such other exceptions as Congress might wish to make by specific statutory enactment. See Reviser's Note to § 2283. An example of a statutory exception in addition to the bankruptcy laws is the Interpleader Act, 28 U.S.C. § 2361.

was needed to aid federal court jurisdiction.[10] Nor did the court hold that an injunction was necessary "to protect" the court's judgment. Therefore, the sole issue is whether an injunction was necessary, within the meaning of the statute, to "effectuate" the court's judgment.

It is important to note briefly just how the Court of Appeals viewed the case in relation to this last exception for effectuation of a federal court judgment. The court reasoned as follows:

When the bargaining between the parties "has run its course," or if Galveston "continues to refuse to bargain," then the union would have a right to strike. And *if* it did strike, the strike would conflict with the state court injunction. Therefore, a federal injunction against use of the state court injunction is necessary to "effectuate the judgment" of the District Court, whatever that judgment may eventually turn out to be.

We submit that this is a far cry from any possible situation Congress had in mind when it narrowly defined the areas of conflict which would permit the extraordinary federal enjoinder of state action. Whatever judgment of the District Court ultimately evolves, it certainly will not be an *order* to strike. The fact is, as even the Court of Appeals seems to concede in parts of its opinion, that the union cannot strike now, regardless of whether this is a major or a minor dispute.

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[10] The extremely limited nature of the exclusion represented by this second exception is made clear by the Reviser's Note following § 2283:

> The phrase "in aid of its jurisdiction" was added to conform to section 1651 of this title and to make clear the recognized power of the Federal courts to stay proceedings in State cases removed to the district courts.

The law prohibits such a strike during the bargaining period.[11] Even under the Court of Appeals ruling, the District Court will only order that the parties bargain and that appropriate "sanctions" be imposed. No one knows when the bargaining will "run its course"—in this case or in any other labor case to which the decision below will equally apply. Sometimes weeks, months or even years pass before such bargaining and the litigation or arbitration emanating from it are finally resolved, as the union conceded in this very case.[12] As this Court pointed out in *Railway Clerks* v. *Florida E.C.R. Co.*, 384 U.S. 238, 246 (1966), "the procedures of the Act are purposely long and drawn out,

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[11] *Brotherhood of Locomotive Eng.* v. *Missouri-K-T R.R.*, 363 U.S. 528 (1960). The court below quoted the following language from *American Airlines, Inc.* v. *Air Line Pilots Ass'n*, 169 F. Supp. 777, 787 (S.D.N.Y. 1958):

> [W]hereas in the case of minor disputes strikes are illegal *per se* because the processes of the Act are final, binding and conclusive throughout and therefore can be enjoined . . . , in the case of a major dispute a strike is not illegal *per se* and cannot be enjoined *if the processes of the Railway Labor Act have been complied with and exhausted* [emphasis supplied].

Surely this language, quoted with approval, should have led the court to recognize that it was protecting a right to strike which did not exist. If this is a minor dispute, striking is illegal; if major, it is illegal until both parties have exhausted the administrative processes under the Act—not the case here.

[12] The Union told the Fifth Circuit in one of its early briefs:

> Complex issues involving the duty of the carrier to bargain, to require the lessee to assume its contract with Appellant, the "successor" doctrine, will be before the System Board, whose processes are already in motion. These matters before the Board will take many weeks, months, and, in view of the inevitable litigation that will ensue over any award that is rendered, even years. [Brief before the Fifth Circuit dated September 25, 1964, p. 18.]

based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute."

The union, for any number of reasons, may well prefer not to strike. Thus, the strike referred to by the Court of Appeals is at most a contingency that may never occur,[13] and even if it does, it will occur at some indefinite future date.

The fact that state and federal law are in complete harmony at this stage of the proceedings is demonstrated by the NLRB order in *United Industrial Workers, supra* n. 1. There, the Board held that SIU violated § 8(b)(7)(c) of the NLRA, after Port Richmond took over the operation of Elevator B, by picketing with the purpose of forcing Port Richmond to bargain with the union. The Board ordered SIU to cease and desist such picketing.[14] Since the Court of Appeals has not ordered the unscrambling of the lease—and in fact has repeatedly indicated that such a sanction will not be necessary[15]—the net effect is that Port Richmond will continue in control of Elevator B at least for the duration of the lease, and the union can-

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[13] SIU once asked the Fifth Circuit to modify the District Court's injunctions so as to allow the union "to take economic action against the lessor-appellee [Galveston] here *if*, and when, the parties have exhausted all of the statutory bargaining procedures . . ." (Brief before the Fifth Circuit dated September 6, 1966, p. 18).

[14] The Board also declined to accept certification of SIU as the bargaining unit, based upon a finding that its chief distinction would be one of separation based on race.

[15] 351 F. 2d at 191; 368 F. 2d at 413; App. C, E.

not picket Elevator B during this period. Under these circumstances, how could it possibly be said that an injunction against state action is necessary to "effectuate" any judgment which the District Court may now enter? Under the circumstances and the applicable law, there is neither a right to strike nor a federal court judgment to be effectuated by an injunction against state proceedings.

More importantly, for the federal courts to encourage strikes by holding that picketing is a *necessary* concomitant of their order to bargain is, we submit, not only erroneous but directly contrary to the national labor policy of discouraging work stoppages whenever possible. Nothing could so unsettle the balance of labor-management relations worked out by Congress than to hold, before bargaining even begins, that "The right to strike is adjunct to the Union's statutory rights and implicit in our order." 400 F.2d at 334; App. H.

It is one thing to hold, as this Court recently did in a 4-to-3 vote, that the ultimate right of the disputants to resort to self-help is implicit in the statutory scheme of the Railway Labor Act. *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 37 U.S.L.Week 4247 (March 25, 1969). It is quite another to make the right to strike part of a court order to bargain. The Court in *Jacksonville Terminal Co.* pointed out that it would be disruptive of the national labor policy to forbid a strike in all instances, since this would so vitally affect the bargaining process. But it is just as clear that a District Court order which obstensibly is directed solely to the bargaining process, but which

in fact carries with it a ruling on the union's right to strike after the bargaining is over, would be equally disruptive of the bargaining process. As the Court pointed out: "The heart of the Railway Labor Act is the duty, imposed by § 2 First upon management and labor, 'to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.' The Act provides a detailed framework to facilitate the voluntary settlement of major disputes." This can hardly be accomplished when the right to strike is incorporated into the District Court's bargaining order, since the bargaining has not been completed and, as this Court recognized in *Jacksonville Terminal Co.*, the union cannot strike in any and all circumstances, regardless of the facts.

There is, however, an even more important distinction between the situation in *Jacksonville Terminal Co.* and the one in the instant case. In that case, the Court repeatedly emphasized that all procedures required by the Railway Labor Act had been exhausted before there was any recourse to the federal or state courts and before any injunctions issued. For example, the Court said: "The events most pertinent to the present litigation began on April 24, 1966, when the Florida East Coast Railway Company (FEC), *having exhausted all procedures required by the Railway Labor Act* for the resolution of a 'major dispute,' unilaterally changed its operating employees' rates of pay,

rules, and working conditions" (37 U.S.L.Week at 4247; emphasis added; footnotes deleted).[16] As we have pointed out, that is not the situation here. The Railway Labor Act machinery has *not* been exhausted. We are not dealing with a present right to strike but rather with a present prohibition against striking, embodied within the federal law itself, for no one claims—not the union and not the courts below—that SIU can strike now, whether or not the state court injunction remains in effect. The imbalance in labor-management relations that would result from the type of order entered below can hardly be overstated. This could hardly have been the intent of Congress.[17]

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[16] The Court also said: "While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo* §§ 2 Seventh, 5 First, 6, 10" (37 U.S.L.Week at 4250); "However, we conclude that the least unsatisfactory one is to allow parties who have *unsuccessfully exhausted* the Railway Labor Act's procedures for resolution of a major dispute to employ the full range of whatever peaceful economic power they can muster, so long as its use conflicts with no other obligation imposed by federal law" (*id.* at 4254; emphasis added; footnote deleted).

[17] "The objection that the bill should in express terms forbid strikes during the period of the inquiry by the emergency board and for 30 days thereafter is successfully met, in the opinion of the committee, by the contention that in forbidding a change in the condition out of which a dispute arose, one of which and a very fundamental one is the relationship of the parties, it already forbids any interruption of commerce during the period referred to; and *if strikes were in express terms forbidden for a given period there might be an implication that after that period strikes to interfere with the passage of the United States mails and with continuous transportation service might be made legal. In the opinion of the committee, this possible implication should be avoided.* S. Rept. No. 222, 69th Cong., 1st Sess. at 5 (emphasis added). This passage from the Senate Report was quoted in *Texas & N.O.R. Co.* v. *Ry. Clerks*, 281 U.S. 548, 566, fn. 3 (1930), in which case this Court also observed that "the major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes.'" *Id.* at 565.

It is not only a matter of labor-management relations. Federal-state relations in this delicate area should not be further strained by forbidding state action based on an entire series of future contingencies, as the Court of Appeals did here.[18] And particularly they should not be strained by a separate court action and an injunction, rather than through the orderly process of appeal. If SIU believed that the state court encroached upon some federal right by restraining its picketing, the proper avenue of challenge was by appeal within the state courts, with ultimate recourse to this Court. "Nowhere has a Federal trial court been given supervisory or appellate jurisdiction over State judges". *Williamson* v. *Puerifoy,* 316 F.2d 774, 775 (5th Cir. 1963). The point is well made by *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co., supra.* In that case the attack on the state court injunction was not made in an ancillary proceeding in the federal courts. Instead, the union took an appeal from the issuance of the state court injunction to the Florida District Court of Appeals and from there to the Supreme Court of Florida. It then sought certiorari in this Court. Thus, there was no occasion in that case to confront the proposition of whether the federal district courts, in an entirely different proceed-

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[18] The tenuous and illusory nature of any conflict between state and federal jurisdictions is illustrated by the Court of Appeals' statement that "The effect of the state court injunction against a *possible* Union strike is *perhaps* to render impotent the duty to bargain imposed by this Court." 400 F. 2d at 331; emphasis added; footnote deleted.

ing, can stay the use of what had separately been obtained from the state courts.[19]

The court's novel interpretation of § 2283 patently ignores the effect clearly intended by Congress and flatly contradicts the authority of past decisions. The final exception in the Act relating to the "effectuation" of judgments was added solely to authorize injunctions against relitigation in a state court of matters *previously* and fully adjudicated by the federal courts.

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[19] The Court of Appeals relied on *California* v. *Taylor*, 353 U.S. 553 (1957). But that case merely held that the Railway Labor Act applies to a state-owned belt railroad engaged in interstate commerce and supersedes provisions of state civil service laws which conflict with the Act. No one disputes that the Act applies in general to petitioner's business, although the grain elevators themselves do not relate to its carrier-type operation. However, it is a far different and quite erroneous position to assert that the applicability of the Railway Labor Act to a carrier owned by an arm of the State means that all power of the State to legislate in relation to such operation is thereby usurped, and even further that such usurpation gives federal courts the power to stay state court orders in ancillary proceedings.

Indeed, the Court in *California* v. *Taylor* implicitly recognized the validity of the California law prohibiting strikes by public employees, and, rather than overturning the law, indicated simply that its reduction of the possibility of work stoppage did not mean that the railroad was not also subject to the collective bargaining requirements of the Act:

> The fact that, under state law, the employees of the Belt Railroad may have no legal right to strike reduces, but does not eliminate, the possibility of a work stoppage. It was to meet such a possibility that the Act's "reign of law" was established [353 U.S. at 566].

In fact, this Court has more recently held in a parallel decision that employees could bring a state action for breach of a collective bargaining contract, even though such conduct would constitute an unfair labor practice prohibited by § 8 of the NLRA. While federal law is directly applicable, the court's jurisdiction is not preempted. *Smith* v. *Evening News Ass'n*, 371 U.S. 195 (1962).

A simple reference to the Reviser's Notes demonstrates this:

> The exceptions specifically include the words "to protect or effectuate its judgments," for lack of which the Supreme Court held that the Federal courts are without power to enjoin relitigation of cases and controversies fully adjudicated by such courts. (See Toucey v. New York Life Insurance Co., 62 S.Ct. 139, 314 U S. 118, 86 L.Ed. 100. A vigorous dissenting opinion (62 S.Ct. 148) notes that at the time of the 1911 revision of the Judicial Code, the power of the courts of the United States to protect their judgments was unquestioned and that the revisers of that code noted no change and Congress intended no change).
>
> Therefore the revised section restores the basic law as generally understood and interpreted prior to the Toucey decision.

Other courts have specifically recognized this restricted meaning.[20] The injunction issued by the District Court here is quite obviously not within the purview of this last exception for relitigation of matters already disposed of in the federal court, and, as previously stated, the court below conceded that it was not within the first two exceptions in § 2283.

Even if this Court were to decide that the Railway Labor Act in some way preempted the state law otherwise applicable to respondent or made a state court injunction inappropriate, the decision below is nonetheless erroneous and disruptive. Such a holding would not obviate the independent prohibition of § 2283.

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[20] *E.g., Allied Mutual Insurance Co.* v. *Roberson*, 306 F. 2d 130 (4th Cir. 1962); *International Ass'n of Machinists* v. *United Aircraft Corp.*, 333 F. 2d 367 (2d Cir. 1964), *cert. denied*, 379 U.S. 946 (1964).

Quite simply, this Court has established beyond question that the flat prohibition against federal court injunctions applies even when state courts are proceeding in an area preempted by federal legislation. *Amalgamated Clothing Workers* v. *Richman Bros. Co.*, 348 U.S. 511 (1955).

The court below attempts to distinguish *Richman*. However, that case is directly in point. It held that under § 2283 the federal court had no power to enjoin state court proceedings initiated by an employer seeking an injunction against union picketing on the ground that such conduct violated state law. An allegation that the state court was "wholly without jurisdiction over the subject matter, having invaded a field preempted by Congress", was not within any exception to the prohibition against enjoining proceedings in state courts (348 U.S at 515).

If the decision below is not reversed, it will likewise stand in direct conflict with those of other circuits which have considered the question. *German* v. *So. Carolina State Ports Authority*, 295 F.2d 491 (4th Cir. 1961); *International Ass'n of Machinists* v. *United Aircraft Corp., supra*. In *German*, the South Carolina Ports Authority obtained an injunction against union picketing from a South Carolina court. The union then sought a federal injunction against use of the state injunction on the ground that the picketing was protected by the NLRA. The Court of Appeals held that even assuming the picketing was protected, the state court proceeding could not be enjoined.[21] In

[21] It added, in language particularly applicable here: "If the state court's restraining order is erroneous, relief may be sought through state channels, ultimately to the Supreme Court of the United States." 295 F. 2d at 495.

International Ass'n, the union sought a federal court injunction to prevent an employer from proceeding in the Connecticut courts with a suit for damages based on organizational activities which the union said were protected by § 7 of the NLRA. The Court of Appeals held that for a number of reasons the federal court could not issue such an injunction. One of these reasons was § 2283:

> There is nothing in the present case which would make that statute inapplicable. There is no express authorization by Act of Congress There is no jurisdiction in the district court which would be aided by an injunction. The district court has issued no judgments which require protection or effectuation [333 F.2d at 371].

Indeed, it is difficult to perceive why the court below erred this time when it had itself previously and correctly applied § 2283. After a careful and lengthy review of the case law, it barred an injunction against state proceedings "even when the subject matter of an action, as federal courts see it, rests exclusively in federal courts under a federal statute." *T. Smith & Son, Inc.* v. *Williams,* 275 F.2d 397, 407 (5th Cir. 1960).[22]

The court quite curiously and mistakenly relied in large part upon the earlier case of *Capital Service, Inc.*

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[22] The Fifth Circuit in that case properly recognized the controlling congressional limitation and the vital underlying bases for enactment of the statute:

> [T]he hands-off doctrine expressed in Section 2283 is to be considered in the light of the function of Section 2283 as a pillar of federalism. Like the doctrine of abstention, its "• • • justification • • • lies in regard for the respective competence of the state and federal court systems and for the maintenance of harmonious federal-state relations in a matter close to the political interests of a State" [275 F. 2d at 407].

v. *NLRB,* 347 U.S. 501 (1954). There, a manufacturer obtained an injunction against certain union conduct and filed an unfair labor practice charge with the NLRB against the union based on *precisely the same conduct.* This Court concluded, quite naturally, that since the NLRB had exclusive jurisdiction, the state court injunction and the exercise of authority by the NLRB were in direct conflict.[23] No such situation exists here.

Finally, even if an injunction were authorized in this case by an exception to § 2283, it would still have been necessary for the respondent to establish in a hearing in the District Court that an equitable basis existed for such remedy. As pointed out in *Douglas* v. *City of Jeannette,* 319 U.S. 157, 163 (1943), the courts "should conform to this policy by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent." No such finding, or even an allegation thereof, was asserted or recognized by the courts below. *No hearing for the taking of testimony has ever been held in this case.* Surely, on the limited facts of the case developed to date, no such finding could be made.

Moreover, if equity rests with either party, it surely favors petitioner. No real injury to the respondent arises if it must refrain from picketing until the validity of the state's prohibition is resolved and the bar-

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[23] Similarly, the case of *NLRB* v. *Schertzer,* 360 F. 2d 152 (2nd Cir. 1966) cited by the court, involved an injunction of state garnishment proceedings, sought by the *Board,* and deemed peculiarly necessary to avoid possible ministerial burdens in supervising compliance with its orders involving backpay.

gaining, if there is to be such, has terminated. On the other hand, how can the petitioners, or their successor, be restored for injury to their business by the action of the respondent, when the basis for the injunction against picketing is ultimately upheld?[24] The court below says that the effect of the state's injunction is "perhaps to render impotent" the court-imposed duty to bargain (citing only the Norris-LaGuardia Act, which it previously had held inapplicable). 400 F.2d at 331. Aside from this being a fallacious conclusion in itself, the fact is that appropriate and sufficient sanctions exist under the Act and under the contempt power of the federal courts to deal with any violations of court orders relating to the bargaining process.

In conclusion, the injunction issued in this case flatly violates the congressional prohibition embodied in § 2283. Clearly, none of the exceptions permitting such injunctions is applicable. If this decision is not reversed, new and irreparable harm will be done to the concept of federalism and the balance of power between the federal and state judiciaries.

B. The Grant of Backpay Without Recourse to Administrative Agencies Violates the Controlling Federal Statute and Conflicts With Decisions of This Court and Other Circuits.

For the first time in the 42-year history of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, a federal court

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[24] The impact upon the public caused by such a strike would be even more serious. The Galveston papers estimated that the loss to the economy of Galveston from the port strike in January-March, 1965, was $100,000 a day. *Galveston Daily News,* January 26, 1965; *Galveston News-Tribune,* February 16, 1965, p. 4. One study indicated that 70 percent of the Island's economy was linked to the Port, and 54 percent of its population was supported directly or indirectly by the Port. *Galveston Daily News,* July 17, 1968, p. 4.

has ordered the award of backpay to employees, under the Act, without any prior determination of any kind by any administrative board or agency.

The holding below is unique in the history of the federal court system and in the development of the field of administrative law. As the Court of Appeals conceded, "Admittedly, no case has been found where a federal court has awarded backpay as part of its enforcement of the status quo in a major dispute." 400 F.2d at 327.[25] Yet that is precisely what the court did in this case. Its ruling not only lacks support in prior case law but directly thwarts the intent of Congress expressed in the Act. If allowed to stand, it will wreck havoc in the railway labor field and, just as importantly, in all of the other administrative fields where backpay awards have heretofore been made by appropriate statutory agencies.

The decision will result in repeated conflicts between the federal courts and administrative agencies over which tribunal has jurisdiction to grant backpay in a given dispute. It will result in double standards as to backpay awards, and forum-shopping by litigants. It will take backpay decisions away from those agencies with experience and expertise in awarding them,[26] and place them in courts ill-equipped to handle them. As

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[25] See also n. 7, *supra*.

[26] There are innumerable ways in which the agencies have had to call upon this expertise in the field of backpay. For example, the NLRB for fifteen years calculated backpay on the basis of the entire period between discharge and an offer of reinstatement. However, as this Court quoted the Board in *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 347 (1953), " 'The cumulative experience of many years discloses that this form of remedial provision falls short of effectuating the basic purposes and policies of the Act.' " Therefore, the method of calculation was changed. This

the Court of Appeals recognized in this very case, it will even result in the appointment of special masters to decide the intricate and multitudinous problems inherent in backpay awards.[27] The use of such special masters, adding new burdens to an already overburdened federal judiciary, is wholly unnecessary in light of the administrative decisional structure already in existence and specially designed by Congress for just this type of case.[28] Citing a lack of "expertise and competence," this Court refused in *Jacksonville Terminal Co., supra*, to allow federal courts to decide issues for which they are "institutionally unsuited" (37 U.S. L.Week at 4254).

The NLRA requires collective bargaining with respect to rates of pay, wages, hours and other conditions of employment, and with respect to questions arising under existing agreements. The Railway Labor Act,

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Court refused to disturb the change, pointing out that "as is true of many comparable judgments by those who are steeped in the actual workings of these specialized matters, the Board's conclusions may 'express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions . . .'; and they are none the worse for it." *Id.* at 348.

[27] SIU told the Court of Appeals in one of its briefs: "The [District] Court's confusion as to the method for computation of backpay, *although understandable*, should certainly not pose an insuperable obstacle" (Brief of Appellant-Appellee dated September 1967 in No. 25081, p. 14; emphasis added).

[28] The court cannot avoid this decisional structure by resort to a master. As the Second Circuit said in *NLRB* v. *New York Merchandise Co.*, 134 F. 2d 949, 952 (2d Cir. 1943): "We start with the premise that Sec. 10(c) makes the fixing of back pay a part of that 'affirmative relief' which is confided solely to the Board; so that no court should assume the duty, whether directly or through a master; we have as little power over it as over 'equivalent employment.' *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 * * *." See also *NLRB* v. *Wentworth Bus Lines*, 191 F. 2d 849 (1st Cir. 1951).

on the other hand, forbids a change in the agreement itself with respect to pay, rules and working conditions without compliance with the notice and bargaining procedures of § 6. See 45 U.S.C. § 152, Seventh. Proposals of such changes may give rise to "major" disputes. On the other hand, issues regarding the meaning of existing agreements or their application to particular fact situations constitute only "minor" disputes to which the requirements of § 6 are inapplicable. *Williams* v. *Jacksonville Terminal Co.*, 315 U.S. 386 (1942); *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561 (1946); *Beeler* v. *Chicago R. I. & P. Ry.*, 169 F.2d 557 (10th Cir. 1948), *cert. denied*, 335 U.S. 903 (1949). As this Court pointed out in *Jacksonville Terminal*, § 6 of the Railway Labor Act was amended by Congress specifically for the purpose of confining the Act's prohibitions to changes *in agreements*.

Furthermore, as pointed out in *Pitney*, "Not only has Congress then designated an agency peculiarly competent to handle the basic question here involved, but it also intended to leave a minimum responsibility to the courts." 326 U.S. at 566. Aside from ordering the parties to resort to administrative procedures when appropriate, the role of a federal court is limited to review or enforcement proceedings if and when a decision by the adjustment or mediation boards are later challenged or ignored by the parties. 45 U.S.C. § 153, First (p) and (q).

In awarding backpay without resort to an administrative tribunal, the opinion below conflicts with decisions of this Court, of other circuits and of the Fifth Circuit as well.

Citing three decisions of this Court, the Seventh Circuit has specifically held that "the district courts of the United States have no jurisdiction in an action to restore a discharged railway employee to his position, or to award him back wages because of his alleged wrongful discharge." *Buster* v. *Chicago, M., St. P. & P. R.R.*, 195 F.2d 73, 74 (7th Cir. 1952).[29]

In *Hilbert* v. *Pennsylvania R.R.*, 298 F.2d 881 (7th Cir.), *cert. denied*, 368 U.S. 900 (1961) the railroad closed its terminal in one city, making it necessary for engineers located there to be reassigned to another city if they continued such employment. The railroad contended that its authority unilaterally to terminate that operation was not abrogated by the existing agreement. The Court of Appeals recognized the presence of a minor dispute subject to administrative remedies and affirmed the District Court's refusal to grant an injunction against the railroad's action. The court held that the union's previously-issued § 6 notice did not convert the dispute into a major one, even though the revisions sought by the union might involve some of the same proposals involved in the minor dispute.

In *Rutland Ry.* v. *Brotherhood of Locomotive Engineers*, 307 F.2d 21 (2d Cir. 1962), the carrier had at

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[29] See also *Walker* v. *Southern Ry.*, 385 U.S. 196 (1966); *Roberts* v. *Thompson*, 107 F. Supp. 775, 776 (E.D. Ark. 1952). Similarly, numerous cases hold that the District Courts have no jurisdiction under the Railway Labor Act to award damages for wrongful discharge. *Buster* v. *Chicago, M., St. P. & P. R.R.*, 195 F. 2d 73 (7th Cir. 1952); *Barnhart* v. *Western Maryland Ry.*, 128 F. 2d 709 (4th Cir. 1942); *Hayes* v. *Union Pacific R.R.*, 184 F. 2d 337 (9th Cir. 1950); *United R.R. Operating Crafts* v. *Northern Pacific Ry.*, 208 F. 2d 135 (9th Cir. 1953), *cert. denied*, 347 U.S. 929 (1954); *Hettenbaugh* v. *Air Line Pilots Ass'n*, 189 F. 2d 319 (5th Cir. 1951); *Roberts* v. *Thompson*, *supra*.

first proposed under § 6 to change any portions of the existing agreement which might prevent it from consolidating, altering or abolishing terminals and runs. However, concerned during the delay about the rising unprofitability of several freight runs and concluding that it would be acting within its rights under the existing agreement anyway, it unilaterally abolished several freight runs. The court held this to give rise to a minor dispute (regardless of the previous notice about the possible changes), observing:

> [W]e should not in the process of classifying this dispute as major or minor thereby also adjudicate the merits of the controversy between the parties. If this is a minor dispute, a decision on the merits of the dispute is the function of the National Railroad Adjustment Board; and if this is a major dispute the outcome of the parties' difference is to be determined by extra-judicial forces and procedures [307 F.2d at 33].

In *Hudson & Manhattan R.R.*, 172 F.Supp. 329 (S.D.N.Y.), *aff'd per curiam sub nom. Stichman* v. *General Grievance Comm.*, 267 F.2d 941 (2d Cir. 1959), *cert. denied*, 363 U.S. 843 (1960), the layoff of unneeded employees following acquisition of new equipment, asserted to be within the carrier's general rights not abrogated by the existing agreement, created a minor dispute; a strike by the union, not the layoff, was enjoined.[30]

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[30] See also *Norfolk & P.B.L. R.R.* v. *Brotherhood of Railroad Trainmen*, 248 F. 2d 34 (4th Cir. 1957), *cert. denied*, 355 U.S. 914 (1958), where the railroad established a new yard at which crews would be required to report for duty. The Fourth Circuit found a minor dispute as to whether the action was within management's prerogative under existing agreements and held the matter subject to final determination by the adjustment board. (Cont.)

The action of the court below also conflicts with its own disposition of other cases. Directly in point in facts as well as applicable law is *Brotherhood of Locomotive Engineers* v. *Central of Georgia Ry.*, 341 F.2d 213 (5th Cir.), *cert. denied,* 382 U.S. 841 (1965). Following ICC approval of the sale of Central's stock to Southern Railway, Central gave notice to its employees that it no longer needed their services due to the resultant consolidation of operations. The court, holding that the dispute was a minor one, stated:

> [I]t does not follow that every time a carrier takes unilateral action that may affect "rates of pay, rules or working conditions" then Section 6 must be invoked on the theory that the carrier is thus intending to effect a "change in agreements affecting rates of pay, rules or working conditions" which the parties here both agree can be accomplished only in the manner provided under Section 6 of the Act. The Central of Georgia Railway does not purport to and has not suggested an intention to make a "change in the *agreements* affecting rates of pay, rules or working conditions" [341 F.2d at 216; emphasis by the court].

The court in that case relied on its earlier decision of similar effect in *St. Louis, S.F. & T. Ry.* v. *Railroad Yardmasters,* 328 F.2d 749 (5th Cir. 1964), where the railroad's plan to abolish some yardmaster positions was viewed as producing a minor dispute depending upon the construction of its rights under the exist-

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Similarly, the general abolition of positions which are no longer either necessary or economically useful do not constitute changes *in agreements* affecting working conditions but at the most give rise to minor disputes regarding the carrier's right to take such action under existing agreements. *Nunn* v. *Missouri Pac. R.R.,* 248 F. Supp. 304 (E.D. Mo. 1966); *Pennsylvania R.R.* v. *Local 2013, Railroad Workers,* 178 F. Supp. 53 (E.D. Pa. 1959).

ing contract. In reversing the decision below, the Fifth Circuit observed that the union and District Court had "fallen into the error of assuming that whenever an issue arises between the carrier and the Union relating to 'rates of pay, rules, or working conditions' then Section 6 must be invoked" (id. at 753).[31]

The Court of Appeals in the instant case thus made a series of mistakes in reaching it erroneous result:

1. The original and basic error was in designating this as a major dispute.

In *Elgin, J. & E. Ry.* v. *Burley,* 325 U.S. 711, 723 (1945), this Court described major disputes as those

> * * * over the formation of collective agreements or efforts to secure them. They arise when *there is no such agreement or where it is sought to change the terms of one,* and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to the assertion of rights claimed to have vested in the past [emphasis added].

Congress thus gave the National Railroad Adjustment Board (or system boards of adjustment specially created to bear the same responsibilities) exclusive jurisdiction to interpret and apply the terms of *existing* collective bargaining agreements in resolving disputes arising thereunder when submitted by either party.

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[31] It has consistently been held that "The Act does not interfere with the normal right of the employer to select its employees or discharge them, or to create and abolish positions, so long as it does not impair the collective bargaining process." *Beeler* v. *Chicago, R.I. & P. Ry.,* 169 F. 2d 557, 560 (10th Cir. 1948), *cert. denied,* 335 U.S. 903 (1949).

No one, including SIU, questions that if this is a minor dispute, the statutorily-established adjustment board has primary exclusive jurisdiction. *Slocum* v. *Delaware, L. & W. R.R.*, 339 U.S. 239 (1950); *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561 (1946). Nor does anyone question that, as the Court of Appeals said, the dispute is a minor one if the Agreement, "by its terms [or] reasonable implication therefrom, * * * *apparently* affords *some arguable basis*" for the employer's action (351 F.2d at 188; emphasis added). The sole issue, then, is whether the Agreement in this case apparently afforded such an arguable basis for Galveston's action. Clearly it did.

As pointed out in our Statement, one article in the Agreement, carefully complied with by Galveston, provided for seven days' notice before employees were "laid off." The Court of Appeals concluded that Galveston's action "was not, and cannot even remotely be justified as a 'lay off' * * *" (351 F.2d at 189). Yet the SIU itself has repeatedly, from the very inception of this case, called Galveston's action a "lay off" or "laying off,"[32] and surely common understanding of this term would encompass this meaning. But if there is some question in this connection, its resolution falls precisely wtihin the statutory responsibility of the Adjustment Board, whose members "understand the railroad problems and speak the raliroad jargon." *Slocum* v. *Delaware, L. W. R.R.*, 339 U.S. 239, 243

[32] Telegram to W. H. Sandberg, Galveston Wharves Board of Trustees, dated August 1, 1964; Telegram to James Balthrop, Port Richmond Elevator Co., dated August 1, 1964; Telegram to Bunge Grain Corp., dated August 1, 1964; Telegram to Mr. Sandberg, dated August 19, 1964; SIU picket signs July 31–October 4, 1964 (see *United Industrial Workers, supra*); Brief before the Fifth Circuit dated November 1967, p. 24.

(1950). See also *Switchmen's Union* v. *Southern Pacific Co.,* 398 F.2d 443 (9th Cir. 1968).

Moreover, while the Court of Appeals at one point stated that Galveston went out of business, at another point in the same opinion it held that Galveston did not go out of business (*supra,* n. 4). And finally, the holding of the Court of Appeals that Galveston terminated its Agreement during the term of the Agreement (351 F.2d at 189) flies in the face of the NLRB's finding that on August 13, 1964, SIU "requested opening of the contract *which it claimed was in force* since it considered Port Richmond as a successor" (*United Industrial Workers, supra;* emphasis added). The point is not which answers to these issues were correct but rather that the issues should have been resolved in the first instance by an administrative tribunal instead of a court, for clearly there was an arguable basis for treating Galveston's action as a layoff covered by the Agreement.

Another article in the Agreement reserved broad management rights to Galveston. Such a management rights clause has been held to waive a union's right to bargain over an employer's good faith decision to close a plant. *Ador Corp.,* 150 N.L.R.B. 1658 (1965); *Druwhit Metal Products Co.,* 153 N.L.R.B. 346 (1965). See also *NLRB* v. *Adams Dairy Inc.,* 350 F.2d 108 (8th Cir. 1965), *cert. denied,* 382 U.S. 1011 (1966); *General Motors Corp.,* 149 N.L.R.B. 396 (1964). Certainly the article provided, at the very least, an arguable basis for Galveston's action. This being so, the dispute was a minor one.

2. Even if the Court of Appeals was correct in finding that the basic dispute is a major one, it does not

follow that the dispute over backpay is also major. The District Court pointed out in its opinion of June 20, 1966 (App. D):

> The moving force behind the action herein taken is the finding by the Court of Appeals that the dispute over the leasing of the elevator is major rather than minor within the meaning of the Railway Labor Act. However, a portion of the relief sought by plaintiff relates to benefits and wages due under the contract. This Court is, of course, without jurisdiction to determine what wages and other benefits have accrued under the terms of the Labor Agreement herein found to have remained in force until September 30, 1964. * * * The amount of wages and benefits due must be resolved by interpretation of the existing contract. This is a "minor dispute" which ultimately must be referred to and determined by the Railroad Adjustment Board, if not disposed of by agreement. * * *

3. Even if the Court of Appeals correctly held that the backpay issue is a major dispute, the court nevertheless reached the wrong result. For as Judge Bell pointed out in dissent to the court's original opinion, the *Darlington* case[33] holds that an employer has the right to close a part of its business so long as there is no showing of an anti-union purpose (351 F.2d at 193). Even the majority of the court conceded that no such anti-union purpose was involved in this case (351 F.2d at 184).

4. Even if the District Court had jurisdiction to grant backpay, it clearly should have declined to do

[33] *Textile Workers of America* v. *Darlington Mfg. Co.*, 380 U.S. 263 (1965).

so under the doctrine of primary jurisdiction. As the District Court pointed out in its opinion of May 3, 1967 (App. G): "This doctrine, as defined in *U. S.* v. *Philadelphia Nat. Bank,* 374 U.S. 321 (1963), requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme."

5. Finally, no award should have been ordered in this case without affording Galveston a fair and complete hearing on the facts. Not a word of oral testimony has ever been taken. Galveston has repeatedly attempted, without success, to introduce evidence as to industry practices, the financial condition of the Elevator B operation, and many other matters.

The Court of Appeals treated the issue of backpay as a relatively simple one, with "sufficient guidelines" already marked out "to chart our course in these waters." 400 F.2d at 327. The District Court took a different view. In its opinion of May 3, 1967 (App. G), the District Court found that problems relating to backpay "brought to the Court's attention by both parties" would "require research into entirely unfamiliar fields." The fact is that this is an extraordinarily complex area. A few of the many problems that could arise in this very case are these:

(1) There is the issue as to whether and to what extent the affected employees have sought other employment. "[A] substantial number of Awards of this Board have firmly established the rule that a Claimant is obligated to mitigate alleged damage by seeking and accepting comparable employment to which entitled by his seniority" (National Railroad Adjust-

ment Board (NRAB) Award 14588, March 10, 1967). As pointed out in our Statement, Port Richmond specifically invited SIU members to apply for work, only one man applied, and he was hired. It may be that the members already had other jobs.[34] Regardless of what the situation is, it must be determined by the appropriate tribunal, because a failure to attempt to obtain suitable employment definitely should result in deductions from backpay.[35]

(2) Backpay must be limited to the expiration date of the contract. *NLRB* v. *George E. Light Boat Storage, Inc.*, 373 F.2d 762 (5th Cir. 1967). A substantial question exists as to whether and when the contract expired.

(3) There will be questions as to whether the employees have been drawing compensation from the Railroad Retirement Board. See NRAB First Division Award 19 208, S, T v. CRI&P; NRAB First Division Award 19 545, T v. CNO&TP.

(4) The Agreement with the SIU guaranteed a forty-hour week but not overtime. If the employees received backpay based on average gross earnings received over the last six months, they would receive payment for overtime work never performed and not guaranteed by the Agreement.

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[34] The union stated in a brief to the Fifth Circuit that if the employees were rehired, "they would have to give up jobs procured in the interim * * *" (Brief dated September 1967, p. 9).

[35] *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 199-200 (1941); *NLRB* v. *Southern Silk Mills, Inc.*, 242 F. 2d 697, 700 (6th Cir. 1957), *cert. denied*, 355 U.S. 821 (1957); *NLRB* v. *Armstrong Tire & Rubber Co.*, 263 F. 2d 680, 683-684 (5th Cir. 1959).

(5) There undoubtedly would be questions about retired employees—questions which the Court of Appeals left open.

(6) The court also noted but did not resolve questions relating to employee contributions to the Seafarers Welfare Plan.

(7) There will be issues over those employees, if any, who have died since August 1, 1964.

(8) What will be the situation in regard to new employees who were hired before August 1, 1964, but after or during the six-month period for calculating average earnings?

(9) The Railroad Adjustment Board does not allow interest on backpay. See NRAB First Division Award 12 476, T v. TRRA of STL. On NLRB awards, some Courts of Appeals have allowed interest and some have not. Obviously, this will be an issue that must be resolved.

But these are just the beginning. Myriad other questions arise in cases before appropriate administrative tribunals. Some of the many problems are illustrated by labor decisions mentioned in the footnote.[36]

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[36] (1) In discrimination cases, backpay has been denied to those union members who, although discriminatorily laid off, would have been laid off for economic reasons even if no discrimination had been practiced. *NLRB* v. *Carolina Mills, Inc.*, 190 F. 2d 675 (4th Cir. 1951).

(2) A backpay order for employees discriminatorily discharged has been held to amount to no more than would equalize earnings with other employees. They should not be awarded for time that the plant was standing idle. *NLRB* v. *Stilley Plywood Co.*, 199 F. 2d 319 (4th Cir. 1952).

(3) There are problems relating to the date of an offer of reinstatement, which must be found in order to determine the termina-

Surely there is no basis for suddenly casting on the federal courts this new burden of resolving these many and varied questions in the first instance. Indeed,

tion of the liability period. *Nashville Corp.*, 94 N.L.R.B. 1567 (1951).

(4) There is no liability for backpay during a period while employees would have been out on strike anyway. *United States Cold Storage Corp.*, 96 N.L.R.B. 1108 (1951).

(5) Backpay may be based on the earnings of another comparable unskilled laborer when employment is not fixed, on the assumption that the claimant would have the same opportunities for work at the same wages. *Pugh and Barr, Inc.*, 102 N.L.R.B. 562 (1953), *aff'd*, 231 F.-2d 558 (4th Cir. 1956).

(6) The fact that the length of work-weeks will frequently vary must be taken into account. *Deena Artware, Inc.*, 112 N.L.R.B. 371 (1955).

(7) Backpay may be denied for failure of an employee to cooperate in determining the amount due or for lack of evidence regarding interim earnings. *Efco Mfg., Inc.*, 111 N.L.R.B. 1032 (1955).

(8) Two or more employees may be jointly and severally liable for backpay. *Norma Mining Corp.*, 101 N.L.R.B. 944 (1952).

(9) Actual physical inability to work during the period may reduce backpay accordingly. NRAB First Division Award 18526, F. v. MSTP&SSM; *Pacific American Shipowners Ass'n*, 98 N.L.R.B. 582 (1952).

(10) Backpay may include an increase for a promotion which the employee would have received. *Underwood Machinery Co.*, 95 N.L.R.B. 1386 (1951).

(11) Expenses for moving to another location where reinstatement is offered have been allowed. *Symns Grocer Co.*, 109 N.L.R.B. 346 (1954).

(12) A customary allowance for quarters and meals has sometimes been included. *West Texas Util. Co.*, 109 N.L.R.B. 936 (1954).

(13) Questions often arise as to vacation pay during the period in question. *Moss Planing Mill Co.*, 110 N.L.R.B. 933 (1954). See also NRAB First Division Award 19 964, T. v. StL-SF.

(14) Questions relating to Workmen's Compensation benefits and health and welfare benefits must be considered. *NLRB* v.

there is every reason to leave them to the bodies created by Congress for this purpose.

The Court of Appeals has ordered "sanctions" against Galveston, and yet it was SIU that—after meeting with Galveston on several occasions about the layoffs, agreeing to arbitrate its grievance, and designating

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Moss Planing Mill, 224 F. 2d 702 (4th Cir. 1955); NRAB Interpretation No. 1 to Fourth Division Award 2034.

(15) Travel expenses for interim employment in excess of travel costs to the employer's plant have on occasion been included. *West Texas Util. Co.*, 109 N.L.R.B. 936 (1954).

(16) Sometimes questions arise as to Christmas gifts to employees during the period at issue. *Moss Planing Mill Co.*, 110 N.L.R.B. 933 (1954).

(17) Insurance benefits have been held to go to the estate of a deceased employee. *Dayton Coal & Iron Corp.*, 101 N.L.R.B. 672 (1952).

(18) Veterans' on-job subsistence pay received while an employee was out has been deducted from backpay. *Somerville Cream Co.*, 106 N.L.R.B. 1155 (1953).

(19) Issues have arisen as to whether union dues over what would normally have been paid should be disallowed. *West Texas Util. Co.*, 109 N.L.R.B. 936 (1954).

(20) There may have to be an exclusion for the estimated effect that a seasonal shortage of work would have had on the backpay of an employee. *NLRB* v. *Sterling Furniture Co.*, 227 F. 2d 521 (9th Cir. 1955).

(21) Medical maternity benefits payable under group insurance may or may not be awarded to backpay claimants who bore children during the period. *Deena Artware, Inc.*, 112 N.L.R.B. 371 (1955).

(22) Similar questions arise as to other medical and hospital expenses, group insurance and life insurance. NRAB Second Division Award 3883; NRAB Second Division Award 4793; NRAB Second Division Award 4866.

(23) Issues arise as to the deduction of taxes. See NRAB First Division Award 19 208, T. v. CRI&P.

its representatives to the System Board of Adjustment—then ceased prosecuting its claim and called a strike. No one has ever alleged that Galveston has not acted in good faith or that it has reflected any anti-union animus in leasing an unnecessary and economically-unsound portion of its business, dealing with SIU according to its rights as it saw them. Even if this were an appropriate case for sanctions, which we deny, the Act itself provides the correct sanction by making a "willful failure or refusal" to comply with the court's demands a misdemeanor punishable by fine or imprisonment. 45 U.S.C. § 152, tenth. The federal courts, in a proceeding to enforce a proper order of the Adjustment Board, also has at its disposal all of the sanctions for contempt of its directions. Here, no determination of the respective rights of the parties has been made; no "sanction" could possibly be viewed as appropriate.

The assumption is not that the court must be allowed to act in these circumstances. On the contrary, unless the Act explicitly allows a judicial remedy, "the assumption must be that Congress fashioned a remedy available only in other tribunals." *General Committee of Adjustments* v. *Missouri-K-T R.R.*, 320 U.S. 323, 337 (1943).

The respondent union, conceding that it could find no statutory or decisional authority to support its request for judicial relief, was quite frankly asking the Fifth Circuit to fashion an entirely new remedy under the Railway Labor Act. The Fifth Circuit complied. We submit that there is no basis in law or in public policy for adding another handicap to the effective functioning of the federal judiciary by depriving it of the benefit of initial (and probably final) resolution

of these problems by responsible administrative bodies. This Court must establish once and for all that primary and exclusive jurisdiction conferred by the Congress is not to be disregarded.

CONCLUSION

The Fifth Circuit in this case has taken two unprecedented steps, one of which will have an important and adverse impact upon federal-state relations and the other of which will have a similar impact upon relations between the federal judiciary and congressionally-created administrative tribunals. Both steps result in conflicts between circuits. We respectfully suggest that this Court, not the Fifth Circuit, should finally rule on two such important innovations in the law. And we respectfully urge that the decision below be reversed.

Respectfully submitted,

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APPENDIX A

STATUTES INVOLVED

Section 2(7) of the Railway Labor Act, 45 U.S.C.A. § 152, seventh:

No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Section 6 of the Railway Labor Act, 45 U.S.C.A. § 156:

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and in the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board. May 20, 1926, c. 347, § 6, 44 Stat. 582; June 21, 1934, c. 691, § 6, 48 Stat. 1197.

28 U.S.C. § 2283:

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. June 25, 1948, c. 646, 62 Stat. 968.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL ACTION No. 64-G-57

UNITED INDUSTRIAL WORKERS OF THE SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, Atlantic, Gulf, Lakes and Inland Waters District, Marine Allied Workers Division, AFL-CIO, *Plaintiff*,

v.

BOARD OF TRUSTEES OF THE GALVESTON WHARVES, BUNGE GRAIN CORPORATION, PORT RICHMOND ELEVATOR CO., INC., and THE CITY OF GALVESTON, TEXAS, *Defendants*.

Schwartz & Lapin (Frank C. Herzog) of Houston, Texas; for plaintiff.

McLeod, Mills, Shirley & Alexander (V. W. McLeod) of Galveston, Texas; for defendants.

MEMORANDUM:

This case having come on for consideration, the Court makes the following determinations.

For purposes of these determinations, the Court assumes, without deciding, the following facts:

1. The Port Richmond Elevator Company is subject to the Railway Labor Act.

2. The successor doctrine binds the Port Richmond Elevator Company to the terms of the collective bargaining agreement between the Seafarer's Union and the Board of Trustees of the Galveston Wharves.

3. The Board of Trustees of the Galveston Wharves is a suable entity.

4. The employees at Elevator "B" are covered by the Railway Labor Act.

After weighing the contentions of both counsel as set out in their respective briefs, the Court has concluded that even after making these above-stated assumptions that exclusive jurisdiction to hear the merits of this case is vested in the proper administrative body designated to hear minor disputes arising under the Railway Labor Act. The Court classifies this controversy as a minor dispute due to the fact that the resolution of the issues involved will depend upon the interpretation of an existing agreement. There is no evidence which indicates to the Court that the City of Galveston or its Board of Trustees or the Port Richmond Elevator Company has made any move to or has any desire to change any of the terms of the present collective bargaining agreement. Therefore, it would follow that neither the 30-day notice requirement nor the ban on unilateral action as required by the Act where a major dispute is involved are applicable to these facts. I find ample authority in support of these propositions in the opinion recently handed down by the Fifth Circuit in *St. Louis-San Francisco and Texas Ry. Co.* v. *Railroad Yardmasters of America,* 328 F.2d 749 (1964).

The Court is aware of its discretionary power to grant injunctive relief to maintain the status quo during the pendency of this action before the administrative board. This was in fact the proper course dictated by the particular facts in the above-cited *Yardmasters* case after its remand to the District Court. The situation now before this Court, however, is not the same as in *Yardmasters.* Here it would appear that if in fact the union members have been denied any vested rights which may have accrued to them under their contractual arrangements with the Board of Trustees of the Galveston Wharves that they have an adequate remedy at law for this injury and that the determination of these rights and the enforcement of this remedy is the very purpose of the proceedings now pending before the administrative body. This Court can see no likelihood that a recovery by the union members

in the Board proceedings could be in any form other than money damages. Plaintiff's Motion for Preliminary Injunction is therefore denied. Plaintiff's Motion to Consolidate and defendant Port Richmond Elevator Company's Motion to Dismiss are hereby rendered moot.

The Clerk will file this Memorandum and send a copy to each counsel.

DONE at Houston, Texas, this 11th day of September, 1964.

JAMES NOEL */s/*
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 21945

UNITED INDUSTRIAL WORKERS OF THE SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, GULF, LAKES AND INLAND WATERS DISTRICT, MARINE ALLIED WORKERS DIVISION, AFL-CIO, *Appellant*,

v.

BOARD OF TRUSTEES OF THE GALVESTON WHARVES ET AL., *Appellees.*

Sept. 14, 1965

Rehearing Denied Dec. 2, 1965

Action to enjoin consummation of lease pending exhaustion of Railway Labor Act machinery. The United States District Court for the Southern District of Texas, James L. Noel, Jr., J., denied application for preliminary injunction, and an appeal was taken. The Court of Appeals, John R. Brown, Circuit Judge, held that after timely demand carrier had to bargain before it could put into effect,

during term of collective bargaining agreement, even a non-discriminatorily motivated lease of its jurisdictional facilities which would effectually suspend all such operations of carrier and its need for operational employees.

Reversed and remanded.

Bell, Circuit Judge, dissented in part.

* * * * * * * * * *

Newton B. Schwartz, Houston, Tex., C. Paul Barker, New Orleans, La., for appellant.

V. W. McLeod, Galveston, Tex., for appellees.

Before BROWN and BELL, Circuit Judges, and HUNTER, District Judge.

JOHN R. BROWN, Circuit Judge:

[1, 2] The major problem in this appeal from a denial of a preliminary injunction is whether the controversy between the Union [1] and the Carrier [2] is a minor dispute under the Railway Labor Act. Scarcely concealed behind the facade of this misnamed major-minor figure, is the basic question whether a carrier, after a timely demand for bargaining, has to bargain before it may put into effect during the term of the collective bargaining agreement a non-discriminatorily motivated lease of its jurisdictional facilities which effectually suspend all such operations of the carrier and the need for operational employees. In answering this, we conclude that what the District Judge thought to be minor was actually a major dispute. We therefore reverse and remand.

As is so often true in these major-minor situations, the facts are simple, neither complex nor conflicting.

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[1] United Industrial Works of the Seafarers International Union of North America, Atlantic, Gulf, Lakes and Inland Waters District, Marine Allied Workers Division, AFL-CIO.

[2] The Galveston Wharves, a facility owned by the City of Galveston, Texas, and operated for it by the Board of Trustees.

The Carrier, Galveston Wharves, the owner and operator of the extensive dock facilities of the Port of Galveston, Texas, has for some activities the status of a carrier by railroad under the Interstate Commerce Act. Among these facilities is Elevator B, a large shipside public grain elevator which it has for many years owned and operated. Presumably because these constitute transportation facilities,[3] 49 U.S.C.A. § 1(1) and (3), the Wharf Company as to them is considered to be a common carrier by rail under the Interstate Commerce Act, 49 U.S.C.A. § 1 *et seq.*, and this brings into play the Railway Labor Act, 45 U.S.C.A. § 151 *et seq.*[4] Pursuant to the Act, the National Mediation

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[3] See 49 U.S.C.A. § 1(1) and (3). § 1(1) extends the Act to "(a) [t]he transportation of * * * property wholly by railroad * * * ." This is amplified. See § 1(3) (a): "The term 'common carrier' * * * shall include * * * all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. * * * The term 'railroad' * * * shall include all bridges, * * * used by or operated in connection with any railroad * * * and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the * * * property including all freight depots, yards, * * * used or necessary in the transportation * * * of * * * such property. * * * The term 'transportation' * * * shall include locomotives, cars * * * and all *instrumentalities* and *facilities* of shipment or carriage, irrespective of ownership or of any contract * * * for the use thereof, and all *services* in connection with the receipt, delivery, *elevation*, and transfer in transit * * * *storage*, and handling of property transported." (Emphasis added.)

[4] Railway Labor Act, 45 U.S.C.A. § 151:

> "First. The term 'carrier' includes any * * * carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad * * *"
>
> "Fifth. The term 'employee' as used herein includes every person in the service of a carrier * * *."

Board, see §§ 154-155, on August 24, 1960, certified the Union as the collective bargaining agent for all elevator employees employed by Carrier, its "successors and assigns."

The collective bargaining Agreement [5] currently in force when the actions here scrutinized took place was, by its terms, effective as of October 1, 1960. It prescribed that it was to "remain in effect until" September 30, 1963,[6] but actually it was a "continuous unless" term.[7] No 60-day termination notice was given in 1963. On the contrary, presumably acting under the proviso (note 7, *supra*), the parties stipulated in September 1963 that the Agreement "is extended for a one-year period * * * through" September 30, 1964.

On July 20, 1964, as permitted under the Agreement, the Union served formal opener notice on the Carrier that it wished to open the existing contract for negotiation. Thereafter, on July 23, the Carrier advised the Union, presumably for the first time officially at least, that it would not negotiate [8] presumably because it had leased Elevator B

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[5] The contract prescribed that it is binding on the Carrier and its "successors." At the time of the lease, 34 employees, many of long service, were covered.

[6] There was a limited reopener right as to wages only on October 1, 1961, and on 60 days' notice October 1, 1962.

[7] Art. I provided that "This agreement shall continue in effect from year to year following October 1, 1963, unless written notice shall be given at least sixty (60) days prior to the first day of October 1963 and provided further, the parties may mutually agree in writing for an extension of the "agreement to avoid such termination."

[8] The letter, July 23, from Carrier to Union stated: "Effective today we are posting layoff notices on the bulletin board at Elevator "B" for all Elevator personnel advising termination of our operation of the Elevator at the close of business on July 31st. Therefore, we will not be meeting with you in connection with the contract termination."

to Port Richmond Elevator Co., Inc.[9] On the same date, the Carrier posted a notice at Elevator B that all of the employees would be permanently laid off effective midnight July 31, 1964, presumably as a result of the lease.[10] On July 29 the Union served what it now describes as a "section 6" notice requesting negotiation of all matters affecting wages, hours, and working conditions covered by the existing contract and particularly a clause covering shutdown, leasing, or subcontracting.[11] The Carrier declined, replying that "It is not possible to reopen the contract under the present conditions." Representatives of Carrier

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[9] Port Richmond (also a defendant-appellee here) is wholly unrelated to the Carrier. On complaint filed by it under LMRA, 29 U.S.C.A. § 160(*l*), the Regional Director, NLRB, sought and obtained a § 10(*l*) injunction prohibiting members of the Union from recognition-picketing of the premises pending determination by the Board of the § 8(b) (7) (C) unfair labor practice charge against the Union. Clifford W. Potter, Regional Director, NLRB v. United Industrial Workers of the Seafarers International Union of North America, et al., Civil No. 64–G–88, S.D.Tex., Galveston Div. Under the practice followed by this Court (See Rules 23(1) 23(a), 1 and 9 *et seq.*), we had this file brought up to consider as a part of the instant record.

[10] The lease was for a term of 5 years, and, dependent upon satisfying specific minimum grain movement volumes, Lessee had option for a 5-year renewal with first option rights to negotiate for successive renewals. Rental was on per bushel of grain moved with 5-year minimum of $1,250,000. The Carrier had substantial obligations for maintenance, repair, and replacement of property and machinery.

This skimpy record does not show whether any of the repair, maintenance, replacement obligations of Lessor-Carrier would customarily have been performed by members of the Union certified by the NMB as representative of Carrier's "Elevator Workers and Maintenance Employees."

[11] The notice requested "* * * specifically that the contract shall include a clause which in essence shall require that before the carrier shall lease, or otherwise relinquish operations of the elevator presently staffed and manned by the employees we represent it shall consult with and obtain the agreement of the certified representative of the aforesaid employees."

and Union thereafter conferred in several sessions, the first on July 31, the last on August 13, but apparently to no avail.[12] The Union commenced a strike on July 31, 1964.[13]

On July 31, 1964, the Union instituted this action against the Carrier and Lessee. Invoking the Railway Labor Act,[14] it sought, in effect, an injunction against the consummation of the lease or operation under it pending exhaustion of the Railway Labor Act machinery, and also a restoration

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[12] The Carrier's brief implies that the Union's conduct in submitting "minor" grievances demonstrates the lack of a "major" dispute. From it we get this information. Subsequent to the July 29 § 6 demand the Union apparently submitted grievances for disposition under the grievance machinery of the agreement. Carrier conferred with Union on July 31 at which time Union merely presented a list of grievances for recognition of new elevator operators, payment of 1965 vacation pay, July 4th holiday pay, and accumulated sick leave. On August 1, Carrier was notified Union was initiating grievance machinery arbitration as to the men laid off. The parties met August 3 at which time Union merely re-urged grievances discussed July 31. There was no discussion by either party of proposed contract changes. On August 4, Carrier agreed to arbitration of grievance after which party designated its representatives on the System Board of Adjustment (see 45 U.S.C.A. § 153). The Union has taken no steps since to prosecute or process the Adjustment Board hearing.

[13] The picketing has since been enjoined pending NLRB determination of the charges against the Union. See note 9, supra. Adding complications, the Union has filed LMRA § 8(a) (3) and (5) unfair labor practice charges against Port Richmond, the Lessee. No complaint has yet issued.

[14] At the bottom is the duty of settlement by discussion. See, § 152, First:

> "First. It shall be the duty of all carriers * * * to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

of the prior status quo. The complaint, setting out the facts briefly summarized here, asserts specifically that the Carrier failed to give the requisite 30 days' notice of proposed changes in violation of § 6 [15] (and § 2, subd. 7)[16] of the Act, 45 U.S.C.A. §§ 156 and 152 Seventh.

After earlier denying an ex parte application for temporary restraining order, the District Court, after a hearing apparently all on affidavits and documents, denied the application for preliminary injunction and this appeal followed. 28 U.S.C.A. § 1292(a)(1).

It rounds out this factual summary to state that the Carrier relied on two provisions of the Agreement, the "7-day clause" [17] and the "management rights clause" [18] as the

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[15] "§ 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions * * *. In every case where such notice of intended change has been given * * * rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 5 of this Act, by the Mediation Board. * * * unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board." 45 U.S.C.A. § 156.

[16] § 152 "Seventh. No carrier, * * * shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section [6] of this title."

[17] Article XVI provides: "Seven calendar days' notice must be given employees that are laid off with notice also being given to the union."

[18] Art. XII provides: "The management of the elevator and the direction of the working force, including, but not limited to the right to hire, suspend, or discharge for good cause, to assign to jobs, to transfer employees within the elevator, to increase and decrease the working force, to determine the products to be handled, the schedules of operation, and the methods, procedures, and means of handling, are vested exclusively in the Carrier; provided this will not be done for the purpose of discriminating against any employee, or in any manner contrary to the provisions of this agreement."

basis for its contention that its actions were sufficiently permitted under the Agreement as to classify the controversy as a grievance for determination by the Railway Adjustment Board.

[3] Before getting into the more troublesome areas as between Union and Carrier, we can quickly dispose of the appeals as to the Lessee Port Richmond.

In a nutshell the Union argues two things. The first is that the representation certificate of the NMB expressly prescribes that the Union is the bargaining representative for the specified "employees of the Galveston Wharves, its *successors and assigns.*" The second is that under contemporary labor law developments, successors are frequently being held to the obligations of their predecessors.

As to the second contention, we would certainly acknowledge that the signs point plainly in the direction of imposing either direct liability or at least the duty to bargain on successors.[19] But the very reason which makes the first contention untenable likewise makes it unnecessary for us to analyze the second. As to each, there is a missing link. This serves to emphasize that even though, as we later hold, operation of the Railway Labor Act does subject the Carrier here to immediate obligations because it has made a lease of limited duration, it does not necessarily follow that Port Richmond, the Lessee, inherits them. The lessee does so only if it too is a carrier under the Act.

Port Richmond, wholly owned as it is by Bunge Corp., likewise unrelated to Carrier, did not require ICC approval for the lease. 49 U.S.C.A. § 5(1). Leasing the facilities did not, therefore, cause it to become a carrier even under the broad sweep of 49 U.S.C.A. § 1 (note 3, *supra*). And completely independent of Carrier here, it did not become one under the Railway Labor Act, § 1 First, which extends

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[19] See especially *Wiley & Sons* v. *Livingston*, 1964, 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed.2d 898; also *United Steel Workers* v. *Reliance Universal, Inc.*, 3 Cir., 1964, 335 F.2d 891; *Wackenhut* v. *International Union*, 9 Cir., 1964, 332 F.2d 954.

the carrier definition to persons operating "any * * * facilities in connection with * * * elevation * * * storage * * * of property" if such party is "directly or indirectly owned or controlled by" a carrier by railroad. 45 U.S.C.A. § 151 First (see note 4, *supra*).

Of course it is not a matter of the employer's choice. If a "carrier," the Railway Labor Act applies. If not a carrier, then LMRA applies. 29 U.S.C.A. § 152(2)(3). Consequently, giving full recognition to the NMB "successors and assigns" certificate, cf. Switchmen's Union of North Amer. v. National Mediation Board, 1943, 320 U.S. 297, 64 S.Ct. 95, 88 L.Ed. 61, it turns out to be irrelevant, cf. Regal Knitwear Co. v. NLRB, 1945, 324 U.S. 9, 65 S.Ct. 478, 89 L.Ed. 661. No matter what it would like to do, Port Richmond must comply with LMRA and except for some rare situations, *e.g.*, § 10(*l*), see note 10, *supra*, the Union's redress must be sought and obtained initially from the National Labor Relations Board.

This brings us to the more troublesome problem of the case as between Carrier and Union. The Trial Judge's memorandum opinion indicates that in denying relief, he did two things. First, apparently thinking that the change was not to be a change of the *agreement* itself and there was some basis for the Carrier's action under the "7-day" and "management rights" clauses (notes 17 and 18, *supra*), he held this was a minor dispute for resolution by the Railroad Adjustment Board.[20] Second, he concluded that

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[20] As to this the Judge stated: "The Court classified this controversy as a minor dispute due to the fact that the resolution of the issues involved will depend upon the interpretation of an existing agreement. There is no evidence which indicates to the Court that [the Carrier] * * * has made any move to or has any desire to change any of terms of the present collective bargaining agreement." Consequently, § 6 notice was not required. For this he found, he stated, "ample authority in support of these propositions in the opinion recently handed down by the Fifth Circuit in *St. Louis-San Francisco & Texas Ry. Co.* v. *Railroad Yard Masters of America*, 328 F.2d 749 (1964)."

equitable considerations did not reasonably require the granting of permissive injunctive relief to preserve the status quo pending decision by the Adjustment Board.

When the actions of the Carrier are carefully analyzed, we think it is clear that this was not a minor dispute. It was major both in fact and in law.

[4, 5] At the outset several things may be briefly emphasized. The first is, of course, that if by its terms of reasonable implication therefrom, the collective agreement apparently affords some arguable basis for the action, the interpretation of the contract, the question of who is right—Carrier or Union—is for determination by the Railroad Adjustment Board,[21] a Court having jurisdiction only to mold equitable relief to preserve the status quo pending Adjustment Board decision.[22] The result ordinarily is that unless the proposed change is to be reflected in a change in the agreement, it is not a § 6 situation and re-

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[21] *St. Louis San Francisco & Tex. Railway Co.* v. *Railroad Yardmasters of America AFL-CIO*, 5 Cir., 1964, 328 F.2d 749; *Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas Railroad Co.*, 5 Cir., 1959, 266 F.2d 335, reversed on other grounds, 1960, 363 U.S. 528, 80 S. Ct. 1326, 4 L.Ed.2d 1379; *Switchmen's Union of North America* v. *Central of Georgia Railway Co.; Brotherhood of Locomotive Engineers* v. *Central of Georgia Railway Co.*, 5 Cir., 1965, 341 F.2d 213; *Brotherhood of Railway and Steamship Clerks* v. *Southern Railway Co. & Central of Georgia*, 5 Cir., 1965, 341 F.2d 217; *Aaxico Airlines, Inc.* v. *Airline Pilots Ass'n International*, 5 Cir., 1964, 331 F.2d 433; *International Ass'n. of Machinists* v. *Eastern Airlines, Inc.*, 5 Cir., 1963, 320 F.2d 451.

[22] *Brotherhood of R. Trainmen* v. *Chicago River & I. R. Co.*, 1957, 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed.2d 622; *Missouri-Kansas-Texas Railroad Co.* v. *Brotherhood of Locomotive Engineers*, 1960, 363 U.S. 528, 80 S.Ct. 1326, 4 L.Ed.2d 1379; *Flight Engineers International Ass'n AFL-CIO* v. *American Airlines, Inc.*, 5 Cir., 1962, 303 F.2d 5.

mains a minor dispute.[23] But this is to be tested as a matter of substance since a carrier in imposing changes in nowise contemplated or arguably covered by the agreement is not to escape the impact of the Act merely through the device of unilateral action which it purposefully intends is not to become a part of the written agreement.[24] This follows from the force of § 2 Seventh (see note 16, *supra*) and the law's refusal to determine "major" or "minor" by the labels affixed by the interested combatants through artfully contrived formalistic demands or responses.[25]

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[23] See, especially *St. Louis San Francisco & Tex. Railway Co.* v. *Railroad Yardmasters of America AFL-CIO,* 5 Cir., 1964, 328 F.2d 749; *Switchmen's Union of North America* v. *Central of Georgia Railway Co.; Brotherhood of Locomotive Engineers* v. *Central of Georgia Railway Co.,* 5 Cir., 1965, 341 F.2d 213; *Brotherhood of Railway and Steamship Clerks* v. *Southern Railway Co. & Central of Georgia,* 5 Cir., 1965, 341 F.2d 217; *Aaxico Airlines, Inc.* v. *Airline Pilots Ass'n International,* 5 Cir., 1964, 331 F.2d 433.

[24] *Florida East Coast Ry.* v. *Board of Railroad Trainmen,* 5 Cir., 1964, 336 F.2d 172; *Florida East Coast Railway Co.* v. *United States,* 5 Cir., 1965, 348 F.2d 682.

[25] Judge Waterman for the Second Circuit in *Rutland Railway Corp.* v. *Brotherhood of Locomotive Engineers,* 2 Cir., 1962, 307 F.2d 21, 33-34 first points out: "In reaching for resolution of this problem of course we must not place undue emphasis on the contentions or the maneuvers of the parties. Management will assert that its position, whether right or wrong, is only an interpretation or application of the existing contract. Unions, on the other hand, in their assertions about the dispute at issue, will obviously talk in terms of change. Since a Section 6 notice is required by the statute in order to initiate a major dispute, the labor representatives are likely to serve such a notice in any dispute arising out of any ambiguous situation so as thereby to make the controversy appear more like a major dispute. * * * Or they may seek to bring the particular conflict at issue within the bounds of an outstanding Section 6 notice that in reality does not relate to that dispute. * * *." He then articulates, for that case, a

When we look at the sharp outlines of this case through ordinary glasses, not major or minor lenses, we can see this case for what it really is: during the term of the contract, the Carrier terminated the contract by going out of business. But it had no right to terminate the contract prior to its expiration. And the action effectually extinguished the relationship of employer and employee, carrier and union.

[6] Without trespassing on the exclusive domain of the Adjustment Board (see note 21, *supra*), it is plain that this action was not, and cannot even remotely be justified as a "lay-off" (see note 17, *supra*) nor as the exercise of managerial prerogative (see note 18, *supra*). Broad as is the management prerogative clause there is absolutely nothing abut the Agreement, or more fundamentally, about the nature of the relationship and the peculiar role of collective bargaining agreements in assuring industrial peace, which contemplates that during the term the employer has the right to bring it all to an end simply by ceasing operations.

Nothing in this record even remotely suggests that this was a temporary layoff of all due to lack of work, retooling, periodic overhaul, change in the method of operation, or the like. This was it—final, positive, all washed up. The Carrier made that clear by posting what it euphemistically

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standard which is helpful in testing the substance of the situation. "It is a major dispute if the present agreements between the railroad and the brotherhoods contain express provisions contrary to the position taken by the railroad or if the clear implication of these agreements is inconsistent with the railroad's proposals. It is a minor dispute if there is a clearly governing provision in the present agreements, although its precise requirements are ambiguous; and it is also minor if what the railroad seeks to do is supported by customary and ordinary interpretations of the language of the agreements." The Sixth Circuit likewise rejected such formalisms. *Brotherhood of Railway & Steamship Clerks* v. *United Airline*, 6 Cir., 1963, 325 F.2d 576, *cert. granted*, 1964, 377 U.S. 903, 84 S.Ct. 1163, 12 L.Ed. 175.

calls its "layoff notice" which advised the employees of the "termination of our operation of the elevator at the close of business on July 31." And then by language which must be rare indeed in the contemporary history of railroad labor relations, the Carrier announced the flat position "we will not be meeting with you in connection with the contract termination" (see note 8, *supra*).

[7, 8] Up to this moment a contract existed between Carrier and Union. Under that contract the elevator was to be operated by the Carrier, the work to be performed by members of this Union. In the language of § 2 Seventh (note 16, *supra*), this was the very essence of the arrangement "embodied in" the Agreement on "rates of pay, rules, or working conditions." Now all was being changed. But the Carrier can point to no provision of the contract giving it the contract right to make this decisive change. We may assume that an employer has the legal right to go out of business. But under the Railway Labor Act when he does so during the term of the agreement, it is such a change in "working conditions" that under § 6 and § 2 Seventh, he must give notice. By the simple language of § 2 Seventh, the procedure of § 6 (see note 15, *supra*) was set in train. There is no pretense that § 6 was complied with. Under those circumstances the Union, and perhaps the National sovereign, became entitled to effective judicial relief to assure fulfillment of this national labor policy. *Florida East Coast Ry.* v. *Board of Railroad Trainmen*, 5 Cir., 1964, 336 F.2d 172; *Florida East Coast Railway Co.* v. *United States*, 5 Cir., 1965, 348 F.2d 682 [No. 22134, July 21, 1965].

[9] If the Carrier's response to this is that the collective Agreement was not terminated, only its physical elevator operations, its predicament is even more defenseless. For on this hypothesis, the contract was still in effect. By its terms, it was to continue to run "from year to year * * * unless written notice was given at least sixty (60) days prior" to the termination date (see note 7, *supra*). The

Carrier had not undertaken to give any such categorical notice. Assuming that its letter response of July 23 (note 8, *supra*) was intended as such a notice, the contract still remained in effect for a period at least up to September 30, 1964, and probably for a minimum of 30 days thereafter [26] The contract clearly gave the Union the right to file both its opener of July 20 (note 6, *supra*) and its § 6 demand of July 29 (note 11, *supra*). By this time the handwriting was indeed on the wall—on the wall of the bulletin board advising the Union members that on midnight July 31, they would be out of a job they had held, some, for many years.

This was taking place during the existence of the contract. This was, as we shall later point out, obviously a change in "working conditions." If—and there is no if at all about it—the Carrier had first the obligation to give a § 6 notice before instituting the change during the contract term, then all the more did the Union have a right to bargain. The § 6 notice was appropriate and was in no sense a verbal formalism confected to give the appearance of a legal right not available. (see note 25, *supra*) Whether the Union would be able to obtain any relief, whether its economic power *vis-a-vis* the Carrier would or would not result in any advantage, the Union through the § 6 notice had the clear right to demand that the Carrier comply with the emphatic demand of § 2 First and Second (see note 14, *supra*). As the announced action most assuredly was a change in "working conditions", the fact that the Union's § 6 notice came after the event is of no moment. The die had been cast but the Carrier could retrieve it. Nor does it detract from the Union's right to talk—at least talk—about a matter so vital to the welfare of its membership that the occasion for a legally peremptory demand was a violation by the Carrier of its own duties.

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[26] Judge Friendly's comments for the Court may well be pertinent here: "The effect of § 6 is to prolong agreement subject to its provisions regardless of what they say as to termination." *Manning* v. *American Airlines, Inc.*, 2 Cir., 1964, 329 F.2d 32, 33.

But all doubt has, we think, been removed by the Supreme Court's action in *Fibreboard Paper Products Corp.* v. *NLRB,* 1964, 379 U.S. 203, 85 S.Ct. 398, 13 L.Ed.2d 233, especially as it relies on the *Telegraphers*[27] case.

In *Telegraphers,* the Court upheld the union's right to a § 6 demand for bargaining as to extensive system-wide abolition of certain positions. The Court pointed out that what carriers must legally bargain about is affected by what is in fact bargained about in the railroad world. (362 U.S. 330, 337-338, 80 S.Ct. 761, 767, 4 L.Ed.2d 774.) And to the contention that the "layoffs" from station abandonments were a minor dispute, the Court was emphatic. "[I]t is impossible to classify as a minor dispute this dispute relating to a major change, affecting jobs, in an existing collective bargaining agreement, rather than to mere infractions or interpretations of the provisions of that agreement."

And in Fibreboard all question is removed whether total displacement of a labor force—there by contracting out, here by withdrawal from business for a time—is a change in "working conditions." By direct citation to *Telegraphers,* it equates this Railway Labor Act term with "terms and conditions of employment" as used in LMRA, 29 U.S.C.A. § 158(a)(5). More than that it recognizes that employees, the most immediately affected group, ordinarily should have a right at least to talk before the deed is done.

> "The subject matter of the present dispute is well within the literal meaning of the phrase 'terms and conditions of employment.' See *Order of Railroad Telegraphers* v. *Chicago & N. W. R. Co.,* 362 U.S. 330, 80 S.Ct. 761, 4 L.Ed.2d 774. A stipulation with respect to the contracting out of work performed by members of the bargaining unit might appropriately be called a 'condition of employment.' The words even more

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[27] *Order of RR Telegraphers* v. *Chicago & N. W. RR,* 1960, 362 U.S. 330, 80 S.Ct. 761, 4 L.Ed.2d 774.

plainly cover termination of employment which, as the facts of this case indicate, necessarily results from the contracting out of work performed by members of the established bargaining unit." 379 U.S. 203, 85 S.Ct. 398, 13 L.Ed.2d 238.

That in Fibreboard the Court, especially in the concurring opinion, is conscious that there may be total displacements left solely to managerial decision unaffected by collective bargaining is neither surprising or decisive here. Nor for that matter is its parallel decision in *Textile Workers Union of Amer.* v. *Darlington Mfg. Co.; National Labor Relations Board* v. *Darlington Mfg. Co.*, 1965, 380 U.S. 263, 85 S.Ct. 994, 13 L.Ed.2d 827. There may well be an absolute legal right to go out of business when not done with anti-union purpose.[28] But the Carrier did not go out of business. Its lease, as leases of large industrial properties go, is short termed indeed. And in many ways it appears to have many of its former owner-operator burdens and obligations.

More than that, the very snarl these employees are in (see note 9, *supra*) shows why an employer subject to the Railway Labor Act may have special obligations in pre-termination bargaining. Suddenly from an action which is entirely legitimate and undoubtedly sound from an economic standpoint, employees of long standing find themselves with neither job nor representation continuity. In no small measure this is due to the mutual-exclusiveness of LMRA and Railway Labor Act. Surely through bargaining a way might be found to accommodate two congressional Act, a single business operation and a labor force whose loyalty or competence has not here been criticized in the least.

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[28] Whether common carriers or other public utilities are as free is not at all certain. On the other hand, apparently the Carrier here did not need ICC abandonment approval to lease (or sell) these non-track facilities. See 49 U.S.C.A. §§ 1(18) (19) (20) (22).

That means we must reverse and remand. We think we need not direct that the lease be unscrambled at this time. But these employees' rights having been so clearly violated, some suitable relief and sanction should be imposed [29] so that bargaining about this operational termination, now so long delayed, may go forward. We do not blueprint these matters. They are best left to the discretion of the District Judge.

Reversed and remanded.

BELL, Circuit Judge (concurring in part and dissenting in part):

I concur in the opinion of the court to the extent that it affirms the District Court in denying relief against Port Richmond Elevator Co., Inc., the lessee. I respectfully dissent from the holding as it relates to Galveston Wharves.

The District Court, in denying relief, was of the view that only a minor dispute was involved and that under the Railway Labor Act the court was without jurisdiction. *Order of Railway Conductors* v. *Pitney*, 1946, 326 U.S. 561, 66 S.Ct. 322, 90 L.Ed. 318; *Slocum* v. *Delaware, L. & W. R. Co.*, 1950, 339 U.S. 239, 70 S.Ct. 577, 94 L.Ed. 795; 45 U.S.C.A. § 153. Our recent case of *St. Louis, San Francisco & Texas Ry. Co.* v. *Railroad Yardmasters of America*, 5 Cir., 1964, 328 F.2d 749, was deemed to be controlling. I agree.

The majority speaks in terms of bargaining over whether the elevator is to be leased, and of perhaps unscrambling the lease. This is drastic relief indeed, and presumably it has not been lightly granted. My difference is that I have looked in vain for some foundation for the holding. This follows in part at least from the fact that I take a much less expansive view of the problem presented.

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[29] See, *e.g.*, interim wage plan approved *Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas Railroad Co.*, 5 Cir., 1959, 266 F.2d 335, reversed on other grounds 1960, 363 U.S. 528, 80 S.Ct. 1326, 4 L.Ed.2d 1379; cf. *N.L.R.B.* v. *American Mfg. Co. of Texas*, 5 Cir., 1965, 351 F.2d 74.

The fact that employees lost their positions is no doubt of major consequence to them but this is far different from a major dispute within the context of the Railway Labor Act. The carrier contended that only a minor dispute was involved. It was operating under an agreement with the union which provided that it could lay off employees on seven days' notice, and which reserved to the carrier broad management prerogatives which may be said to embrace its decision to lease the elevator. See Articles XVI and XII, Footnotes 17 and 18, majority opinion.

The dispute necessarily turns on a construction of these provisions to determine whether the carrier acted within its rights. This is a classic example of a minor dispute which under the law is to be handled by the Railway Adjustment Board. See § 3, First (i) of the Railway Labor Act, 45 U.S.C.A. § 153, First (i), which provides that disputes between a carrier and its employees "growing out of * * * the interpretation or application of agreements concerning rates of pay, rules, or working conditions * * * may be referred * * * by either party to the * * * Adjustment Board." See *Order of Conductors* v. *Pitney, supra,* and *Slocum* v. *Delaware, L. & W. R. Co., supra,* to the effect that such disputes are not for the courts. Minor disputes under the Railway Labor Act which, as stated, involve questions of interpretation of an existing collective bargaining agreement are to be distinguished from major disputes. This latter type are those arising from efforts to change working conditions through the making of a new agreement. They involve the creation of new rights rather than the enforcement of existing contractual rights. Major disputes go eventually to mediation in an effort to avoid a strike. § 6 of the Act, 45 U.S.C.A. § 156, which the majority states has been violated by the carrier here is a part of the major disputes settlement machinery. *Elgin, J. and E. R. Co.* v. *Burley,* 1945, 325 U.S. 711, 65 S.Ct. 1282, 89 L.Ed. 1886, 1894-1895. See also *Brotherhood of L.F. and E.* v. *Florida East Coast Ry. Co.,* 5 Cir., 1965, 346

F.2d 673, on the difference between major and minor disputes.

Certainly the carrier may argue in good faith that it acted under the layoff and management prerogative provisions of the agreement. This is all that is necessary to leave the question to the Adjustment Board and it is for that tribunal to construe it. *St. Louis, S. F. & T. Ry. Co.* v. *Railroad Yardmasters of America, supra.*

The majority puts aside the minor dispute contention, apparently because jobs were terminated; and takes the position that a major dispute over the right to lease—something outside the contract—is involved. This is said to bring § 6 of the Act into play, and the carrier in violation because it has not followed § 6. The correctness of this position, of course, turns on whether the dispute is major or minor and, as stated, I think it is minor.

I could not concur even if a major dispute were presented absent a determination that the lease in question did not amount to a bona fide termination of elevator operations by the carrier. The majority leans on *Fibreboard Corp.* v. *NLRB,* 379 U.S. 203, 85 S.Ct. 398, 13 L.Ed.2d 233, a case concerned with the duty under the National Labor Relations Act to bargain over terms or conditions of employment. 29 U.S.C.A. § 158(a)(3) and (5). There the court relied on its prior decision of *Order of Railroad Telegraphers* v. *Chicago & N. W. R. Co.,* 1960, 362 U.S. 330, 80 S.Ct. 761, 4 L.Ed.2d 774, to sustain the proposition that the contracting out of work was a condition of employment over which bargaining was mandatory. The subject matter for mandatory bargaining under § 6 of the Railway Labor Act in the *Telegraphers* case was an amendment to the existing labor agreement offered by the union that no existing jobs would be abolished except by agreement. The carrier was in the process of closing some of its stations with the result that jobs would be lost.

The union here seeks to bargain over what may be argued is an amendment similar in result, the right to lease the

elevator. However, I would distinguish the *Telegraphers* case on the ground that the carrier there did not propose discontinuing some definite phase of its operations as a carrier such as a branch line or the like. If the carrier here ceased its elevator operations through the medium of a bona fide lease, and this is a matter for the District Court to first determine, then I think the *Telegraphers* case would not obtain for the reason that a cessation of business question instead of a condition of employment question is presented. I would answer that question in favor of the carrier on the authority of the gloss put on § 6 of the *Railway Labor Act* by the *Textile Workers of America* v. *Darlington Manufacturing Co.*, 1965, 380 U.S. 263, 85 S.Ct. 994, 13 L.Ed.2d 827, which removes cessation of business questions from the realm of mandatory bargaining. Fibreboard involved the contracting out of work, activity also different from discontinuing a business.

There is not a whisper in the record of the elevator having been leased because of anti-union animus. Darlington makes it clear that management has the absolute right to go out of business even for anti-union purposes where the whole business is closed. Here Galveston Wharves leased only a part of its business. It retained its switching operation. Darlington holds that an employer has the right to close a part of its business so long as there is no showing that the closing was for anti-union purposes. The employer would however, be bound for the balance of the period of any existing contract in such event, here two months. Hence, § 6 of the Act, even if the dispute is major in light of the *Telegraphers* case, might nevertheless be inapplicable depending on the facts regarding whether there was a bona fide cessation of the elevator business by the carrier.

Being unable to distinguish the rationale of our own case of *St. Louis, San Francisco & Texas Ry. Co.* v. *Railroad Yardmasters of America, supra,* I would affirm.

Rehearing denied; BELL, Circuit Judge, dissenting.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL ACTION No. 64-G-57

UNITED INDUUSTRIAL WORKERS OF THE SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICT, MARINE ALLIED WORKERS DIVISION, AFL-CIO, *Plaintiff*,

v.

BOARD OF TRUSTEES OF THE GALVESTON WHARVES, BUNGE GRAIN CORPORATION, PORT RICHMOND ELEVATOR CO., INC., and THE CITY OF GALVESTON, TEXAS, *Defendants*.

Newton B. Schwartz of Houston, Texas; for plaintiff.

McLeod, Alexander, Powel & Apffel (V. W. McLeod) of Galveston, Texas; for defendants.

Memorandum and Order

The decision of this Court that the controversy here involved was a minor dispute, within the meaning of the Railway Labor Act, 45 U.S.C.A. Sections 151 et seq., for resolution by the Railroad Adjustment Board, having been reversed by the Court of Appeals for the Fifth Circuit,[1] the case is again before this Court on mandate from the Court of Appeals to fashion "some suitable relief and sanction . . . so that bargaining about this operational termination now so long delayed, may go forward."[2] By motions now pending before the Court, respective counsel for plaintiff and defendants suggest vastly divergent courses for this Court now to follow, each asserted to be in line with the mandate of the Court of Appeals. Some points raised

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[1] *United Indus. Wkrs. of Seafarers, etc.* v. *Board of Trustees etc. et al*, 351 F.2d 183 (5th Cir. 1965).

[2] 351 F.2d at 191, 192.

by each side are worthy of consideration. I shall first discuss those raised by defendant.

Defendants urge that this case is now back in the same posture as before the Court overruled plaintiff's motion for preliminary injunction, and that a hearing must now be had to determine if a preliminary or permanent injunction, as prayed for in plaintiff's amended petition, should issue. I do not agree. The facts pertinent to this issue are neither complex nor in dispute. While the "notice" requirement of Rule 65 Fed.R.Civ.P. implies a hearing, in a case such as here affidavits may serve this function instead. See: *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Local Eng.*, 266 F.2d 335 (5th Cir. 1959); *Ross-Whitney Corp.* v. *Smith Kline & French Laboratories*, 207 F.2d 190 (9th Cir. 1953). The futility of such a hearing becomes most apparent when the evidence which defendant would present is considered.

Defendants would offer evidence (1) as to the negotiations which preceded the agreement in 1963 to extend the contract, (2) that it was a well-known fact that Galveston Wharves had been negotiating with other companies before the lease to Port Richmond Elevator Company was consummated, (3) the lease of the elevator had been under consideration as far back as 1961, and (4) it was not economically feasible for the City of Galveston to continue operation of the elevator. All four tenders ultimately bear on the construction to be given the "management rights clause"[3] of the labor agreement. Further consideration

[3] Art. XII provides: "The management of the elevator and the direction of the working force, including, but not limited to the right to hire, suspend, or discharge for good cause, to assign to jobs, to transfer employees within the elevator, to increase and decrease the working force, to determine the products to be handled, the schedules of operation, and the methods, procedures, and means of handling, are vested exclusively in the Carrier; provided this will not be done for the purpose of discriminating against any employee, or in any manner contrary to the provisions of this agreement."

here of possible rights arising under this clause, however, has been effectively foreclosed by the Court of Appeals,[4] thereby rendering such evidence to be irrelevant here.

On the other hand, the relief sought by plaintiff and, at least in part, alleged to be indicated by the mandate from the Court of Appeals seems to be without bounds. In the plaintiff's language, and with no pleas omitted, it seeks:

> (1) ". . . that this Honorable Court order wages paid in the interim from the date of termination of employment of employees represented by Plaintiff to the present."
>
> (2) "[that this Court] order Defendant to bargain in good faith concerning the operational termination of Elevator B as it affects wages, hours, seniority, class of retirement and disability benefits, and other terms and conditions of employment accruing as a result of employees working for Defendant Galveston Wharves, at Grain Elevator B, . . ."
>
> (3) "Defendant Galveston Wharves having failed to give written notice at least sixty days prior to the termination date, or by July 31, 1964, or 1965, that this Honorable Court judicially declare said Contract still in full force and effect, and Defendant responsible for all obligations and liabilities thereunder until the next anniversary date of October 1, 1966."
>
> (4) "That this Honorable Court declare the lease of its premises by Defendant to require either the continued employment of all employees so desiring same represented by Plaintiff, or the equivalent of benefits including but not limiting to wages, retirement, disability, and all others."
>
> (5) ". . . other suitable relief and sanctions . . ."

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[4] "[T]his action . . . cannot even remotely be justified . . . as the exercise of the managerial prerogative [clause]" (found at 351 F.2d 189).

(6) ". . . dissolution of all injunctive relief heretofore secured by Defendant Galveston Wharves . . ."

(7) "A preliminary injunction to issue and remain in effect until hearing on permanent injunction requiring defendant to bargain in good faith . . ."

(8) "As penalty for its previous breach of duty to bargain . . . to require Defendant to pay all pension and welfare contribution to the Seafarers' Welfare and Pension Plan."

(9) "That defendant be required to pay in addition to taxable costs heretofore ordered by the Court of Appeals, all reasonable and necessary attorneys' fees incurred and paid by Plaintiff to the undersigned [Newton B. Schwartz] and to co-counsel, . . . which Plaintiff avers to be in a sum in excess of $25,000.00."

(10) "To modify the previous Section 10(L) injunction issued at the request of the National Labor Relations Board, and (sic) another but related proceeding to permit economic action, including the right to picket and strike by Plaintiff, ..."

(11) "That the lease be unscrambled at this time in addition to requiring Defendant to bargain in good faith with respect to the leasing of said facilities. . . ."

(12) "That such other relief in addition to the modification of the injunction heretofore issue to permit Plaintiff to exercise . . . economic force to return the situation to the status quo as it existed on and prior to July 31, 1964, ..."

(13) "Plaintiffs acknowledge that at a later date when all parties can be prepared, a full hearing may be had upon the issuance of the permanent injunction [see plaintiff's First Amended Original Complaint filed 8-14-64], but that in the interim, temporary in-

junction must issue under the mandate of this Court [Court of Appeals] heretofore filed on December 15, 1965."

I shall now treat each of the requested items of relief. Item No. 5, "other suitable relief and sanctions," will be reserved for the last because in my opinion, the relief warranted by equitable considerations as well as that indicated by the mandate from the Court of Appeals can best be discussed under Item No. 5.

Plaintiff first asks that wages be paid from the time employment was terminated until the present. This Court is, of course, lacking in *discretionary* power to grant such a request. It is elemental that these wages must be due as a matter of *contract* before such an award could be made, and evidence [5] now before the Court is decisive on this issue. While by its terms [6] the labor agreement would be automatically extended for an additional year unless notice was given 60 days prior to its termination date, language giving more emphatic notice could hardly be framed than that found in the letter of July 23, from Carrier to Union (see note 5). This notice being timely, I find that by its

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[5] Agreement, Exhibit A to Plaintiff's 1st Amended Original Complaint.

Letter of July 23, 1964, from Carrier to Union, stating:

"Effective today we are posting layoff notices on the bulletin board at Elevator 'B' for all Elevator personnel advising termination of our operation of the Elevator at the close of business on July 31st. Therefore, we will not be meeting with you in connection with the contract termination."

[6] Art. I provided that: "This agreement shall continue in effect from year to year following October 1, 1963, unless written notice shall be given at least sixty (60) days prior to the first day of October 1963 and provided further, the parties may mutually agree in writing for an extension of the agreement to avoid such termination."

terms the Agreement terminated on September 30, 1964.[7] It follows that plaintiff's first and third requests must be denied.

Plaintiff's second request is granted.

This Court is without power to grant plaintiff's fourth request, the subject matter of which lies entirely within the realm of free bargaining and contract negotiation between the parties concerned. Plaintiff's fourth request is therefore denied.

Plaintiff's requests numbered six (6), seven (7), eight (8), nine (9), ten (10), eleven (11), twelve (12), and thirteen (13) are denied.

I move now to plaintiff's request numbered five (5). While the preceding paragraph is perhaps rather a succinct indication of what this Court finds *not* indicated, either by the equities involved or the mandate from the Court of Appeals, the *positive* side of the coin must be of greater importance to those most intimately concerned. The problem is not an easy one. As Judge Brown says at page 191 (351 F.2d):

> "Suddenly from an action which is entirely legitimate and undoubtedly sound from an economic standpoint, employees of long standing find themselves with neither job nor representation continuity. In no small measure this is due to the mutual exclusiveness of LMRA and Railway Labor Act. Surely *through bargaining* a way might be found to accommodate two congressional Acts,

[7] In dicta, the Court of Appeals stated, "Assuming that its letter response of July 23 was intended as such a notice, the contract still remained in effect for a period at least up to September 30, 1964, and probably for a minimum of 30 days thereafter." 351 F.2d at 190. While finding in accord with this dicta that the contract remained in effect until September 30, 1964, this Court has also found that it was not extended for the additional 30 days.

> a single business operation and a labor force whose loyalty or competence has not here been criticized in the least." (Emphasis added.)

As indicated by the granting of plaintiff's second request for relief, it is the intention of this Court to comply with this mandate and order that such bargaining now go forward. This bargaining must proceed as indicated by the "major disputes" provision of the Railway Labor Act, 45 U.S.C.A. § 156. It must constitute a good-faith effort on the part of both sides to reach an equitable solution to the problem outlined in the earlier-quoted language of Judge Brown, which encompasses, of course, the particular issues raised by plaintiff in its second request for relief.

The usual remedy granted upon a finding of a Section 6 violation is injunctive relief which returns the parties to the status quo as it existed prior to the complained-of unilateral action. This is on the theory that the very purpose of section 6 is to stabilize relations, and this can best be accomplishd by artificially extending the lives of Labor Agreements for the period required to exhaust Section 6 procedures regardless of the intentions of the parties. See: *Manning* v. *American Airlines, Inc.*, 329 F.2d 32 (2d Cir. 1964), cert. den. 379 U.S. 817. This injunctive relief can be granted absent a showing of irreparable injury normally required in a court of equity due to the judgment of Congress as expressed in Section 6.[8] See: *Brotherhood of Locomotive Fire & Eng.* v. *Southern Ry. Co.*, 217 F.Supp. 58 (D.C. 1963). This Court, however, has been cited no authority, and has found none, which indicates that such relief should be applied to create severe hardship as would inevitably result if the parties now before this Court were

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[8] Section 6 provides in part, "rates of pay, rules or working conditions shall not be altered by the Carrier until the controversy has been finally acted upon, as required by Section 5 of this Act, by the mediation Board."

by judicial action relegated to their respective positions as they existed on July 31, 1964—the relief requested by plaintiff. This relief would envision abandonment of the existing lease, relief even more sweeping than an "unscrambling of the lease," which appears to have been rejected in the minds of the framers of the mandate from the Court of Appeals.[9] In fact, the cornerstone upon which that mandate is predicated is the finding that, as a matter of law, "the Carrier did not go out of business"[10] due to the "short term" nature[11] of the lease. This is the circumstance which may give promise to the Section 6 proceeding herein ordered as required by the mandate of the Court of Appeals.

The moving force behind the action herein taken is the finding by the Court of Appeals that the dispute over the leasing of the elevator is major rather than minor within the meaning of the Railway Labor Act. However, a portion of the relief sought by plaintiff relates to benefits and wages due under the contract. This Court is, of course, without jurisdiction to determine what wages and other benefits have accrued under the terms of the Labor Agreement herein found to have remained in force until September 30, 1964. Having found, in response to plaintiff's first request for relief, that the letter of July 23, 1964 from Carrier to Union, was adequate notice of termination as contemplated by the parties, this Court has done all that it properly may do in this regard. The amount of wages and benefits due must be resolved by interpretation of the existing contract. This is a "minor dispute" which ulti-

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[9] "We think we need not direct that the lease be unscrambled at this time." 351 F.2d at 191.

[10] 351 F.2d at 191.

[11] The lease was for a term of 5 years and, dependent upon satisfying specific minimum grain movement volumes, Lessee had option for a five-year renewal with first option rights to negotiate for successive renewals.

mately must be referred to and determined by the Railroad Adjustment Board, if not disposed of by agreement. *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Loc. Eng., supra* [266 F.2d 335 (5th Cir. 1959)].

Counsel for plaintiff shall prepare an appropriate order and submit it to the Court after having first submitted it to defendants' counsel for inspection.

The Clerk shall record this Memorandum and Order, and shall send a copy to each counsel.

DONE at Houston, Texas, on this 20 day of June, 1966.

JAMES NOEL
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 23929

UNITED INDUSTRIAL WORKERS OF THE SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC GULF, LAKES AND INLAND WATERS DISTRICT, MARINE ALLIED WORKERS DIVISION, AFL-CIO, *Appellant*,

v.

BOARD OF TRUSTEES OF THE GALVESTON WHARVES and the City of Galveston, Texas, *Appellees*.

BOARD OF TRUSTEES OF THE GALVESTON WHARVES and the City of Galveston, Texas, *Appellants*,

v.

UNITED INDUSTRIAL WORKERS OF THE SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC GULF, LAKES AND INLAND WATERS DISTRICT, MARINE ALLIED WORKERS DIVISION, AFL-CIO, *Appellees*.

Nov. 16, 1966

Union appealed from an adverse decision of the United States District Court for the Southern District of Texas, Ben C. Connally, J. The Court of Appeals, Dyer, Circuit Judge, held that some suitable relief and sanction should be imposed in controversy between union and carrier with regard to carrier's lease of jurisdictional facilities and concomitant suspension of all such operations of carrier and need for operational employees, so that bargaining, even though long delayed, should go forward, which matter

should be left to District Court's sound discretion, and that court's refusal of union's tender of evidence bearing on construction to be given management rights clause of bargaining agreement was proper where such was held irrelevant in view of prior opinion of Court of Appeals.

Affirmed in part; reversed in part.

* * * * * * * * * *

[1] We observe, *in limine,* that the main thrust of appellee's argument on this appeal and cross-appeal, and reiterated in its post-argument supplemental brief, is that this court's prior opinion was erroneous, and that we should therefore review and revise the conclusions therein reached. Our previous ruling is the law of this case and will not be reconsidered on this second appeal. *Hildreth* v. *Union News Company,* 6 Cir. 1963, 315 F.2d 548.

The facts are set forth in our prior opinion and need not be fully restated.

Under the collective bargaining agreement between the Carrier, Galveston Wharves, and the Union, having an expiration date of September 30, 1964, the Union served an opener notice on July 20, 1964, to negotiate. The Carrier declined on July 23, 1964, because it had leased its elevator (where the employees worked), and gave notice of a lay-off on July 31, 1964. On July 29, 1964, the Union served a "Section 6"[2] notice under the Railway Labor Act, 45 U.S.C.A. § 156.

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[2] "§ 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions * * *. In every case where such notice of intended change has been given * * * rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board." 45 U.S.C.A. § 156.

The Union sought and was denied a preliminary injunction. In reversing we said that the dispute was major, not minor; and that after a timely demand by the Union under Section 6, the Carrier was required to bargain before it could put into effect, during the term of the collective bargaining agreement, a lease which would put to an end the need for its employees. We concluded by saying:

> "We think that we need not direct that the lease be unscrambled at this time. But these employees' rights have been so clearly violated, some suitable relief and sanction should be imposed so that bargaining about this operational termination, now so long delayed, may go forward. We do not blueprint these matters. They are best left to the discretion of the District Judge." 351 F.2d at 191, 192.

On remand, the order entered on the mandate merely required the parties to bargain in good faith and failed to impose any sanctions. It is plain that this order did not provide the *suitable relief and sanction* that this Court found to be not only appropriate but necessary. Although recognizing that returning the parties to their pre-lease status would be the usual remedy under these circumstances, the District Court nevertheless refused, on the ground of hardship, to afford any relief. The District Court apparently mistook the breadth of the discretion afforded it for the existence of discretion, for the discretion granted the District Court was not whether to restore the status quo but only *how* to restore it. There must be an impact on the duty to bargain to prevent the employer from getting a windfall for having violated the Act, while protecting the employees' benefits against the lapse of time. While we did not foreclose the possibility that the lease might have to be unscrambled—a literal restoration of the status quo—we felt that something less could be substituted, so long as the employees were put substantially

in the same position as if Galveston Wharves had complied with the Act.[3]

[2] We must, and do, again emphasize that some suitable relief and sanction should be imposed so that bargaining, now even longer delayed, may go forward. Again we leave these matters to the sound discretion of the District Judge.

[3] The Union also sought to have the District Court modify injunctions it issued at the instance of the National Labor Relations Board in an entirely different proceeding, in which Galveston Wharves was not a party, restraining the Union from picketing and striking. The District Court's refusal to do so was proper.

[4] Finally, Galveston Wharves' assignment of error in its cross appeal, that the District Court refused its tender of evidence, bearing on the construction to be given the "management rights clause" of the bargaining agreement, is without merit. The District Court correctly rejected this as irrelevant in view of this Court's prior opinion.

The order of the District Court is affirmed as to its refusal to modify the injunctions to permit the Union to picket and strike, and is otherwise reversed and remanded for further proceedings not inconsistent with the views herein expressed.

Affirmed in part and reversed in part.

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[3] See, *e.g.*, the interim wage plan approved *Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas Railroad Co.*, 5 Cir., 1959, 266 F.2d 335, reversed on other grounds 1960, 363 U.S. 528, 80 S.Ct. 1326, 4 L.Ed.2d 1379; cf. *NLRB* v. *American Mfg. Co. of Texas*, 5 Cir., 1965, 351 F.2d 74.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

Civil Action No. 64-G-57

UNITED INDUSTRIAL WORKERS OF THE SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICT, MARINE ALLIED WORKERS DIVISION, AFL-CIO, *Plaintiff*

v.

BOARD OF TRUSTEES OF THE GALVESTON WHARVES, AND THE CITY OF GALVESTON, TEXAS, *Defendants*

Newton B. Schwartz of Houston, Texas, and Shulman, Abarbanel & Kroner (Joel Field) of New York, New York; for plaintiff.

McLeod, Alexander, Powel & Apffel (V. W. McLeod) of Galveston, Texas; for defendants.

Memorandum and Order

Having been found by the Court of Appeals for the Fifth Circuit[1] to have exceeded the breadth of discretion afforded this Court on its first attempt, this case is again before this Court to fashion "some suitable relief and sanction . . . so that bargaining . . . may go forward."[2]

The facts as evolved prior to the Mandate from the Court of Appeals of December 9, 1966, need not be restated here. The full history of the development of the case until then is contained in Memoranda issued by this Court on Sep-

[1] *United Indus. Wkrs. of Seafarers, etc.* v. *Galveston Wharves, et al.*, 351 Fed. 183 (5th Cir. 1965).

[2] *United Indus. Wkrs. of Seafarers, etc.* v. *Galveston Wharves, et al.*, 368 Fed. 412 (5th Circuit 1966).

tember 15, 1964, and June 20, 1966, and in the two Circuit Court Opinions cited in footnotes 1 and 2.

On December 21, 1966, this Court, noting that correspondence relating to the institution of bargaining had passed between the parties and expressing its hope that the *status quo* could be restored by agreement, ordered the parties to appear in early January, 1967, and report on the likelihood that such agreement could be reached. On January 6, 1967, counsel for both sides reported that counsel were negotiating and making progress toward settlement. Each joined in a request for additional time in which to compromise their differences. This request was granted, and the parties were ordered to report next on January 26, 1967. On January 26th the parties again reported progress but again joined in a request for additional time. This was granted and they were told to make their next status report on February 21, 1967.

On the latter date the Union filed its "Motion for Interim Relief and Imposition of Sanctions . . .," the terms of which reveal at a glance that settlement negotiations had been irrevocably broken off by counsel for the Union. Part of the relief requested by the Union entailed the staying of a State Court injunction which has been in effect since August 11, 1964. For this reason each side was afforded time in which to prepare and submit a brief on this new point. The Union's response of March 8, 1967 to defendant's reply brief having been received, it is again timely for this Court to act. Noteworthy is the fact that the relief deemed appropriate by each side, as expressed in these most recent briefs, constitutes a full retreat on the part of both the Union and Wharves, each to the most extreme position assumed by it during this lengthy proceeding.

First, to be in consonance with the opinion of the Court of Appeals, I must now and hereby do retract the earlier finding of this Court that "the [bargaining] Agreement

terminated on September 30, 1964."[3] In its stead I now find this Agreement to be currently in full force and effect, and that it will remain in full force and effect throughout the "Section 6"[4] proceedings hereinafter to be ordered. *Manning* v. *American Airlines, Inc.*, 329 F. 2d 32 (2nd Cir. 1964), *cert. denied* 379 U.S. 817. Perhaps the dictate of logic is that such *must* be the case, because if the Agreement were considered to have terminated at some time in the past, then only a dispute over *vested* rights could here be involved, and by definition such a dispute must be classified as "minor." *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711 (1945).

Having established the predicate that the Collective Bargaining Agreement (effective October 1, 1960) shall remain in effect at least until bargaining has been concluded, I now proceed to formulate specific relief and sanctions in compliance with the Mandate from the Court of Appeals.

It is therefore ordered:

FIRST: That both sides are to proceed in good faith to bargain as provided under the "major disputes" provision of the Railway Labor Act. 45 U.S.C.A., Sections 155 and 156. Such bargaining shall constitute a good faith effort on the part of both parties to reach a mutually acceptable solution to the operational termination of Elevator B as it affects wages, hours, seniority, class of retirement and disability benefits, and other terms and conditions of employment. It must be emphasized, however, that "Section 6" bargaining looks to the *future, Elgin J. & E. R. Co.* v. *Burley, supra,* and that settlement of *accrued* claims for wages, etc. are not proper subjects for such bargaining. Provision for such claims are made under Section Three of this Order.

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[3] Memorandum and Order of June 20, 1966.

[4] 45 U.S.C.A., Section 156.

While the Court notes that correspondence has passed between the parties concerning the institution of bargaining,[5] I am of the opinion that it would be prudent to indicate here just what the procedural requirements of such bargaining are, as placed upon these parties by the Railway Labor Act, *supra*, to which both sides remain subject until such procedures have been complied with. Firstly, a time and place for the beginning of such conference shall be agreed upon. I hereby direct that this be accomplished on or before March 27, 1967. I further direct that such bargaining conference actually be commenced on or before April 10, 1967. On the negative assumption that a genuine good faith effort to resolve differences exercised by both sides results in deadlock, then the requirements of the Railway Labor Act, *supra*, will have been fully met, *unless* within ten days after termination of conferences either party has requested the services of the National Mediation Board, or such services have been proffered. If, and again assuming in the negative, efforts to bring about an amicable settlement through mediation shall be unsuccessful, and further assuming that either party refuses to submit the controversy to arbitration, then the procedures of the Act will have been fully complied with, if and when thirty days elapse after the parties have been notified by the Board that its mediatory efforts have failed, unless an emergency board is created as provided in 45 U.S.C.A., Section 160. It is also at this time that the Bargaining Agreement (effective October 1, 1960) shall terminate.

SECOND: That each former employee of the Galveston Wharves at "Elevator B" whose employment was terminated midnight, July 31, 1964, be tendered an offer of employment by the Board of Trustees of the Galveston Wharves, and/or The City of Galveston, at wages and hours at least equal to those in effect on July 31, 1964. Insofar

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[5] Letter of 12/14/66 from Wharves to Union. Letter of 12/15/66 from Union to Wharves.

as possible the type of work assigned to each employee who accepts such offer is to be commensurate with that which he was performing on July 31, 1964. These offers of employment are to be tendered on or before March 27, 1967, and must be accepted in writing by each person desiring to do so within seven days from receipt of the offer or said offer shall be deemed rejected. Such employment shall be offered for a period running concurrently with the life of the Bargaining Agreement (effective October 1, 1960). A date is to be set by the Wharves upon which all persons who have elected to accept these offers of employment are to commence work.

THIRD: That each person discharged from "Elevator B" be paid the difference between what that person would have earned had his employment continued and his wages and hours remained constant since July 31, 1964, and what that person has actually received from other employment, if any, with interest on this difference calculated at six per cent (6%) per annum. The period of time for which such payment is to be made shall commence at midnight, July 31, 1964, and shall terminate on the day and at the hour set by the Board of Trustees of the Galveston Wharves for those persons who have elected to accept re-employment under the preceding section (Second) of this Order to commence work. The number of hours worked to be used in this calculation shall be figured by taking the average number of hours worked each week by each employee during the six-month period immediately preceding July 31, 1964. The basic wage rate is to be the hourly wage received by each employee on July 31, 1964. No increase in this hourly wage is to be considered in this calculation, even if such is provided by contract (except as provided for overtime), as this contract has been extended herein by artifice of law for the sole purpose of maintaining the *status quo,* as it existed on July 31, 1964. It is to be presumed that all income received by each of these discharged employees since July 31, 1964, would not have been received

but for his discharge, and is therefore properly to be offset against the back wages herein ordered to be paid. However, if any discharged employee can prove by clear and convincing evidence that he would have received any part of such income had his employment at "Elevator B" not terminated, then that part of the income received by him is not to be subtracted from the back wages to which he is entitled.

These general guidelines have been designed with a single purpose in mind—this being, insofar as possible, to bring the income of each person discharged from "Elevator B" up to the exact level where it would have been had his employment continued at "Elevator B" at the same rate of pay received on July 31, 1964. This Court is of the opinion that both sides have acted in good faith in supporting their conflicting positions. It would seem that by use of these guidelines the parties can now proceed to agree upon and stipulate to the Court for approval the amount of back wages due each discharged employee.

Such stipulation, if it can be had, shall be presented to the Court on or before May 22, 1967. If not accomplished by such date, the Court will presume that a deadlock exists and will proceed to appoint a special master, under the provisions of Rule 53, F.R.Civ.P. Such master will hear the facts and submit an accounting to the Court as to the exact amount of back wages due to each discharged employee as to which the parties had been unable to agree.

FOURTH: That the lease need not be unscrambled. The essential ingredients here are much like those in *N.L.R.B.* v. *American Manufacturing Company of Texas,* 351 F.2d 74 (5th Cir. 1965). There, in support of its decision that the employer need not spend $150,000.00 to purchase new trucks, although such purchase would be required for literal restoration of the *status quo,* the Court stated at Page 80:

> "The Employer has, we hold, violated the Act in several particulars. But it is not an outlaw. When it bargains, it must do so in good faith. But on this

> major issue, it may bargain to the bitter end of a real impasse. Thus with a new fleet of unwanted trucks on its hands, it might, and quite legitimately could, renew its determination to use public carriers. As with Christmas bonuses, it might turn out to be all bargaining — no bargain, no bonus; no trucks, no truck drivers."

The following language found in *Manning* v. *American Airlines, Inc.*, 221 F. Supp. 301 (S.D. N.Y. 1963), affirmed 329 F. 2d 32, *cert. denied* 379 U.S. 817, clearly indicates this rationale to be equally applicable to a dispute arising under the Railway Labor Act:

> "It is not required that defendant reach or make any agreement to continue the dues check-off (the subject of the 'major' dispute there). It is required that defendant bargain in good faith on the subject with the union, and until the processes contemplated by the Act are concluded, the defendant must continue the check-off (maintain *status quo*). If the processes under the Act are followed to completion and no agreement results, defendant will then be free to stop the check-off—but not before."

This Court is of the opinion that payment of back wages, plus tender of re-employment during the life of the contract, accomplish such restoration of the *status quo* as is indicated and warranted by equity, the Railway Labor Act, *supra*, and the Mandate of December 8, 1966, from the Court of Appeals. This Court is further of the opinion that the representatives of the discharged employees are not placed in an essentially dissimilar position at the bargaining table because the lease has not been unscrambled than they would have enjoyed had this bargaining proceeded during the summer of 1964. Again quoting from *N.L.R.B.* v. *American Manufacturing Company of Texas, supra*, that Court gave the following as an additional reason why the defendant there should not be required to invest $150,000.00 for trucks to restore the *status quo:*

> "Since we order back pay and reinstatement of the employees the Union has persons to bargain for. It

> does not need trucks to bargain for the men. And in the absence of record facts justifying it, we do not see why the Union should be given the economic pressure of this tentative, perhaps momentary, but nevertheless mandatory investment as an aid to the bargaining."

As stated earlier, the overriding concern here is with restoration of the *status quo*—to make whole, but neither to punish nor reward.

I turn now to the Union's request that defendants be enjoined by this Court from enforcing, giving continued effect to, or availing themselves in any manner of a temporary injunction issued by the 10th District Court of Galveston County, Texas in Cause No. 101, 634 on August 11, 1964, and, further, that the City of Galveston be directed to withdraw its first amended petition filed in that cause on February 8, 1967. Plaintiff asserts that, unless this Court exercises its power under 28 U.S.C.A., Section 2283 to, in effect, stay the State Court's injunction, the underlying purpose of Section 6 of the Railway Labor Act will be frustrated. This purpose, according to plaintiff, is to allow the parties to engage in free and unfettered bargaining. While there is some doubt that 28 U.S.C.A., Section 2283 would allow the Court to interfere in the State proceedings in the circumstances here,[6] even if this doubt were resolved in favor of plaintiff's position I would nevertheless deny the request. In *California* v. *Taylor*, 353 U.S. 553 (1957) the Supreme Court has defined the relations between the Railway Labor Act and state law. While this case is clear authority for the proposition that the Railway Labor Act preempts *conflicting* state law, it is also established therein that the State injunction of which the plaintiff here complains is not to be considered in conflict with the true purpose of the federal Act, which is "to avoid any interruption to commerce or the operation

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[6] See: *Amalgamated Clothing Workers* v. *Richman Brothers*, 348 U.S. 511 (1955); Anno: "Power of federal district court to enjoin state proceedings involving labor disputes", 98 L. Ed. 982.

of any carrier engaged therein."[7] No other interpretation can be placed upon the following language found at Page 566:

> "The fact that under State law, the employees of the Belt Railroad may have no legal right to strike, reduces, but does not eliminate, the possibility of a work stoppage. It was to meet such a possibility that the Act's 'reign of law' was established.

Plaintiff's request, as framed in Paragraph VI of its motion of February 20, 1967, is therefore denied.

Brief mention of the relief requested by plaintiff in Paragraphs III, IV and V of its motion is warranted. In Paragraph III the Union asks that the defendants make such contributions to the Seafarer's Welfare Plan as "should have been paid to said Plan pursuant to the terms of the existing collective bargaining agreement . . . ." This Court has searched the Agreement[8] for any provision requiring that payments of this nature be made by the defendants and has been unable to find reference of any nature to the Seafarer's Welfare Plan. The relief requested in Paragraph III of plaintiff's motion is denied.

Next, in Paragraph IV of its motion, the Union asks that the defendants be ordered to pay all contributions required under the Railroad Retirement Act, 45 U.S.C.A., Sections 228 *et seq.*, and the Railroad Unemployment Insurance Act, 45 U.S.C.A. Sections 351 *et seq.* which have not been paid due to the layoff of July 31, 1964. I find such relief not envisioned in the mandate to this Court and therefore deny this request.

I further find that the plaintiff, as a private organization, is *without standing* to raise this issue. See: *Tileston* v. *Ullman,* 318 U.S. 44 (1943); *Railway Express Agency* v. *Kennedy,* 189 Fed. 801 (7th Cir. 1951) *cert. denied* 342 U.S.

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[7] 353 U.S. at 566.

[8] Exhibit A to Plaintiff's First Amended Original Complaint.

830. Contributions enacted from carriers under these Acts constitute a type of *tax. Railway Express Agency* v. *Kennedy, supra.* Any concern which the Union could have with whether defendants in fact owe contributions to the Government under either or both of these Acts is too remote to constitute a justiciable interest. I express no opinion as to whether such contributions are owed to the Government or not, but merely state that this is a matter exclusively between the defendants and the appropriate Government Agency.

Finally, in Paragraph V of its motion, plaintiff requests that the defendants be assessed all taxable costs "heretofore ordered by the United States Court of Appeals for the Fifth Circuit" and, in addition, that the defendant pay "all reasonable and necessary attorney fees" incurred by plaintiff. Both requests are denied. The matter of costs is exclusively within the province of the Court of Appeals. *Texas Development Co.* v. *McGough Bros.,* 167 Fed. 268 (5th Cir. 1948). The denial of plaintiff's request for attorney's fees is inherent in my earlier finding that both sides have so far "acted in good faith in supporting their conflicting positions." An award of attorney's fees would not, therefore, be appropriate in this instance. See: Vol. 10, Cyclopedia of Fed. Proc. at Page 430.

This cause shall, of course, remain active upon this Court's docket until such things as herein have been ordered have occurred.

The Clerk shall record this Memorandum and Order and shall send a copy to each counsel named herein, as well as to The Executive Secretary of The National Mediation Board at Washington, D. C.

DONE at Houston, Texas, on this 20th day of March, 1967.

//S/ JAMES NOEL
United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

Civil Action No. 64-G-57

UNITED INDUSTRIAL WORKERS OF THE SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICT, MARINE ALLIED WORKERS DIVISION, AFL-CIO, *Plaintiff*

v.

BOARD OF TRUSTEES OF THE GALVESTON WHARVES, AND THE CITY OF GALVESTON, TEXAS, *Defendants*

Newton B. Schwartz of Houston, Texas, and Shulman, Abarbanel & Kroner (Joel Field) of New York, New York; for plaintiff.

McLeod, Alexander, Powel & Apffel (V. W. McLeod) of Galveston, Texas; for defendants.

Memorandum and Order

On March 20, 1967, this Court issued its Memorandum and Order which reflected its interpretation of the most recent mandate from the Court of Appeals.[1] On March 25, 1967, plaintiff filed its "Motion to Reconsider and Amend Memorandum and Order Entered by this Court on March 20, 1967." Plaintiff's request for hearing and oral argument on this motion was granted. The hearing was held on March 29, 1967. At the hearing defendants filed their brief in support of their motion, the introductory paragraph to which reads as follows:

> "We know that there must be an end to arguments, but since the Union has obtained a rehearing, we would

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[1] *United Indus. Wkrs. of Seafarers Int.* v. *Board of Trustees*, 368 F.2d 412 (5th Cir. 1966).

like to point out to the Court certain matters wherein we think the Court was in error:"

The briefs and oral arguments of plaintiff and defendants have persuaded me that the Court's Memorandum and Order of March 20, 1967 should be substantially modified.[1a]

First, the Union has asked the Court to reconsider its denial of "such payments to the Seafarers Welfare Plan from midnight, July 31, 1964, as would have been paid had employment continued at Elevator B. Galveston Wharves." For this purpose the record was re-opened over defendants' objection, to allow plaintiff to offer an alleged supplement to the Labor Agreement in which the defendant Board of Trustees had agreed to make certain payments to the Seafarer's Welfare Plan. The tendered supplement referred to the Trust Agreement of the Seafarer's Welfare Plan and certain Trustees thereunder, as well as a division of contributions to the Plan between the Welfare Plan and Pension Plan. The Trust Agreement was not tendered and the Trustees were not identified. The supplement was not admitted in evidence. I am satisfied, nevertheless, by assurance at the hearing of plaintiff's New York counsel that benefits due under the Welfare Plan and Pension Plan to the employees involved here are in no way related to receipt by the Trustees of the contributions here sought to be recovered as an element of sanctions. I find that such payments are not properly to be included among the sanctions afforded here.

This is not to say that the Union is not entitled in a proper action to assert and have reviewed its claim to such

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[1a] This matter already has been the subject of three orders of this Court as follows: (1) entered on 9-15-64; (2) entered on June 21, 1966; and (3) entered on 3-20-66. Appeals were taken from the first two orders, opinions in which are reported as follows: (1) 351 F.2d 183 (1965) and (2) 368 F.2d 412 (1966). In this, the fourth Memorandum and Order, a complete knowledge of the prior orders and opinions will be assumed, for to restate them here would extend this writing far beyond any reasonable length.

contributions. It is only to say that this Court interprets the mandate under which it is now acting, to require imposition of sanctions which directly inure to the benefit of the particular employee discharged from Elevator B on July 31, 1964, as distinguished from those which would inure to the general membership of the Union or to the Union itself.[2]

Even if the supplement had been admitted here, and if contributions to the Seafarer's Welfare Plan were properly to be considered as sanctions to be imposed here, a serious question would remain involving the absence of Trustees of the Plan who are claimed to be necessary parties by defendants. However, subsequent developments have rendered moot this entire issue as to the contributions.[3]

For reasons to be developed later, I will grant the Union's request that this Court exercise its power under 28 U.S.C.A. Section 2283 to enjoin defendants from availing themselves of injunctive relief afforded by the State District Court of Galveston County, Texas. But, before going into my reasons for granting the injunction, I will turn to the first error asserted by defendants to have been made in this Court's Memorandum and Order of March 20,

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[2] "But *these employees'* rights have been so clearly violated, some suitable relief, etc." 351 F.2d at 191. Also, "we felt that something less could be substituted so long as *the employees* were put substantially in the same position, etc." 368 F.2d at 413.

[3] On March 31, 1967, plaintiff filed its "Motion for Reopening of Record and Hearing [of March 29]" for the purpose of introducing the trust indenture to which admissibility of the supplement to the Agreement had been tied. However, on April 5, plaintiff filed its motion to withdraw its motion of March 31 "*because this claim may well be a minor dispute under the Railway Labor Act* and its litigation, including offering of evidence therein, might unduly delay the other pressing matters which have already been litigated . . ." Plaintiff's motion of April 5 is hereby granted. Thus the record remains in the same posture as before this Court's action of March 20, 1967, but my determination of this question stands as stated therein.

1967. Defendants assert that "The back pay should be limited to the expiration date of the Contract, September 30, 1964." I do not agree.

As authority for its contention that the Agreement expired by its terms on September 30, 1964, irrespective of the fact that the carrier had not complied with the major disputes provisions of the Railway Labor Act, defendants cite the following language from the majority opinion of the Court of Appeals in the first appeal:

> "Assuming that its letter response of July 3 . . . was intended as such a notice, the Contract still remained in effect for a period of at least up to September 30, 1964, and probably for a minimum of thirty (30) days thereafter." (351 F.2d at 190)

Defendants overlook, however, as did this Court in its order entered in response to the first mandate, the language found in footnote 26 appended to this passage in the majority opinion. This footnote contains the vital clue:

> "Judge Friendly's comments for the Court may well be pertinent here: 'The effect of Section 6 is to prolong agreement subject to its provisions regardless of what they say as to termination.' *Manning* v. *American Airlines, Inc.*, 2d Cir., 1964, 329 F. 2d 32, 33."

I am now convinced that Judge Friendly's conclusion is implicit in the Act. If a more authoritative pronouncement is needed, however, it is to be found in *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 342 U.S. at page 347, where the Court squarely held:

> "We hold that the failure of the carrier to proceed as provided by the Railway Labor Act of 1926, then applicable, left the collective agreement in force throughout the period. . . ."

I must, and therefore do, deny defendants' request that I reject my finding of March 20th that the Agreement is

currently in full force and effect and will so remain until all Section 6 bargaining is concluded.

I turn now to the question of back wages and will review the action on this question to date. In my Memorandum and Order of June 20, 1966, I concluded:

> "The amount of wages and benefits due must be resolved by interpretation of the existing contract. This is a 'minor dispute' which ultimately must be referred to and determined by the Railroad Adjustment Board, if not disposed of by agreement. *Missouri-Kansas-Texas R.R. Co.* v. *Brotherhood of Loc. Eng.* [266 F. 2d 335 (5th Cir. 1959)]"

In my more recent action of March 20, 1967, however, I assumed the initial responsibility of formulating guidelines, through the use of which it was expected that the parties could calculate and then stipulate the amount of wages due. The possibility that a special master would be appointed under Rule 53, F.R.Civ.P., if needed, was expressly held in reserve. It is now apparent, however, that these guidelines are inadequate for their intended task.

Problems have arisen almost immediately of such nature that their solution lies neither in amplification by this Court of what had been intended in its Order of March 20, 1967 nor in the appointment of a master, as a master must also be bound by the Court's guidelines. Those problems brought to the Court's attention by both parties at the March 29th hearing lie almost exclusively in areas not heretofore brought to the attention of the Court by counsel or reasonably foreseeable by the Court, prior to the entry of its Order.

To some questions raised there would seem to be an obvious answer—even though the answer must come from the Court. Others would require research into entirely unfamiliar fields.

But my greater concern lies in the fact that in part this Court's action of March 20, 1967 in ordering payment of

back wages is without precedent in reported court decisions governed by the Railway Labor Act. If departure from the usual is warranted, such departure either must be carefully supported by logic, or clearly directed by the opinion or mandate of the Court of Appeals.

My action of March 20, 1967 with respect to payment of back wages was predicated on the following language to be found in the second opinion of the Court of Appeals, 368 F.2d 414, 1966, which I then felt constituted such clear direction:

> "On remand, the order entered on the mandate merely required the parties to bargain in good faith and failed to impose any* sanctions. It is plain that this order did not provide the *suitable relief and sanction* that this Court found to be not only appropriate but necessary." 268 F.2d 413
> *(emphasis added)

The type of relief which had been granted in the two cases cited as examples of "suitable relief and sanction"[4] by the Court of Appeals had reinforced my conclusion that the reference in this Court's action of June 20, 1966 of back wages to the Railroad Adjustment Board had been disapproved by the higher court. The wording of identical footnotes in which these cases are cited in both mandates is:

> "See, e.g., the interim wage plan approved Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas Railroad Co., 5 Cir., 1959, 266 F. 2d 335, reversed on other grounds, 1960, 363 U.S. 528, 80 S.Ct. 1326, 4 L.Ed.2d 1379; cf. NLRB v. American Mfg. Co. of Texas, 5 Cir., 1965, 351 F. 2d 74."

I had, of course, reconciled these cases with my action of June 20, 1966. After the second remand (368 F.2d 412), however, I assumed, but I now conclude erroneously, that reference to the Railroad Adjustment Board for

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[4] 351 F.2d at 191, 192.

initial determination of wages due under the Labor Agreement had been disapproved. There were two reasons for this assumption. The first was the pointed reference to the "*interim wage plan*[*s*] approved" in the two cited cases. The second was the statement contained in the second remand opinion to the effect that this Court had "failed to impose *any* sanctions." Being now of the opinion that my interpretation of this facet of the second mandate, as reflected in my action of March 20, 1967, was erroneous, it follows that the assumption by this Court of jurisdiction to formulate guidelines for calculation of back wages must be re-examined.

In *Missouri-Kansas-Texas RR. Co.* v. *Brotherhood of Loc. Eng.*, 266 F.2d 335 (5th Cir. 1959), which is the first example next above referred to, the district court had enjoined a railroad strike *at employer's behest* pending decision by administrative bodies to whom the dispute there had been referred. In the same order granting the injunction to employer, the district court also:

> "directed the Railroad Companies to restore and maintain conditions affected by their General Orders 119 and 120 to the conditions which had existed prior to the effective date of such orders or, on the election of the Companies, pay the employees adversely affected by such orders the same amounts they would have paid such employees had the changes made by such orders not been effected." (226 F.2d at 337)

The Fifth Circuit Court of Appeals affirmed the enjoining of the strike, but reversed the above quoted part of the district court's order. The theory of the Court of Appeals was that the dispute was "minor" and that the action of the district court amounted to passing preliminary judgment upon the merits of a controversy committed to the exclusive jurisdiction of the Railroad Adjustment Board.

The Union's application for certiorari was granted. The Supreme Court (363 U.S. 528) reversed the Court of

Appeals and affirmed the district judge's action in restoring the status quo upon the following reasoning:

> "If the District Court is free to exercise the typical powers of a court of equity, it has the power to impose conditions requiring maintenance of the *status quo*. Conditions of this nature traditionally may be made the price of relief when the injunctive powers of the court are invoked and the conditions are necessary to do justice between the parties." (363 U.S. at 531, 532)

also:

> "The balancing of these competing claims of irreparable hardship is, however, the traditional function of the equity court, the exercise of which is reasonable only for abuse of discretion. And although respondents maintain that there has been such an abuse in this case, scrutiny of the record does not persuade us that the evidence was insufficient to support the judge's action." (363 U.S. 535)

The equitable jurisdiction of this Court has been invoked by the *Union*, however, rather than the employer. The basis for the holding in *M.K.T.* was the traditional power of a court of equity to *impose conditions* upon the granting of an extraordinary remedy such as an injunction. Certainly, the granting of back wages here can in no way be considered a *proper condition* to the granting of an injunction at the urgent request of the Union and over the strong protest of the employer, as is to be done herein. The Supreme Court merely recognized the power of a district court to impose such conditions and observed that the exercise of such power is subject to review only for abuse of discretion. The Supreme Court also recognized that minor disputes are exclusively committed to the Railroad Adjustment Board under the Act. Thus, close analysis of *M.K.T.* supports my conclusion that the initial determination of back wages in this case is to be made by the Railroad Adjustment Board.

In *N.L.R.B.* v. *American Manufacturing Company of Texas*, 351 F.2d 74 (5th Cir. 1965), the second example

referred to by the Court of Appeals as a guide for tailoring suitable relief and sanction, there was involved a petition by the N.L.R.B. for enforcement of its order which had been entered in favor of the union. There the employer had decided to contract out its extensive transportation activities and to this end abolished its transportation department, which resulted in the discharge of all of its drivers except one. The Board found the decision to have been at least in part motivated by the employer's desire to rid itself of the union and ordered the employer to bargain with the union. It also ordered that the employer:

1. Resume trucking operations (which would have necessitated purchase of new trucks);
2. Offer reinstatement to all discharged drivers to their former or substantially equivalent positions; and
3. Pay drivers back pay from date of discharge with interest at 6 percent per annum.

Points 2 and 3 of the N.L.R.B. order were enforced by the Court of Appeals, but point 1 was remanded as the Court found insufficient support in the record for this part of the order. In pertinent part, the Court stated:

> "In exacting that [the remand of the order that trucking operations be resumed] we do not hold that Board could not properly impose such a remedy. We hold merely that it lacks necessary support in the record." (351 F.2d at 81).

The most pertinent analogy to be drawn between this decision and the facts before this Court is that in each instance an administrative body has been specifically designated by Congress to make the initial determination. In cases governed by the National Labor Relations Act, as was the one above, this responsibility falls upon the National Labor Relations Board (the case was before the Court of Appeals upon the petition of the N.L.R.B. for enforcement of its order). A similar procedure is followed

in cases arising under the Railway Labor Act. Exclusive jurisdiction is vested by this Act in the Railroad Adjustment Board to initially determine matters which require the application of a bargaining agreement, as does the question of back wages here.

Thus, neither decision referred to by the Court of Appeals can be interpreted as authority that this Court was intended to assume jurisdiction to make the initial determination of what back wages and benefits are due under the Agreement. The N.L.R.B. decision is, in fact, a square holding in favor of the opposite position. I conclude, therefore, that reference by the Court of Appeals to the "interim wage plan[s] approved" in these two cases was in the nature of a directive that this Court point out the established procedure provided in the Railway Labor Act to obtain such relief, rather than a directive to depart from such procedure.

My second reason for thinking that my action on June 20, 1966 of directing the question of back wages to the Railroad Adjustment Board had been specifically disapproved by the Court of Appeals was the statement in the court's opinion that this Court had "*failed to impose any sanctions.*" After further study and particularly in the light of the definition of the term *sanction,* the accuracy of the last quoted statement is apparent. But, from this statement it does not follow that this Court was being instructed to make the initial determination of back wages.

The term *sanction*, in legal usage connotes the *vindicatory* part of a law, or that part which ordains or denounces a penalty for its violation. Black's Law Dictionary (1951). The sanction of an oath is, aside from the secular fear of exposure as a perjurer, a belief that the Supreme Being will punish falsehood. *Blocker* v. *Burness,* 2 Ala. 354-356. Thus, the punitive element is an essential ingredient of a sanction. No injustice is implied, however, as this punishment under law is administered only in redress of a wrong,

whether civil or criminal. *Commissioners' Court of Nolan County* v. *Beall,* 81 S.W. 526 (Tex. 1904).

The wrong done here by the employer, whether accompanied by "wrong" intentions or not, centers entirely around its failure to bargain with the union over the leasing of the elevator. *United Industrial Wkrs. of Seafarers, etc.* v. *Board of Trustees,* 351 F.2d 183 (5th Cir. 1965). This Court's action of March 20, 1967 differs materially from its prior action of June 20, 1966 in that the expiration date of the Labor Agreement was extended therein until the "Section 6" procedures had been exhausted. Having found the Agreement in full force and effect my order of reinstatement of the discharged employees followed automatically. Defendants, however, simply have *no* work for these men to do, whether substantially equivalent to what they had been doing at Elevator B or otherwise. In compliance with the Court's order they have restored these ex-employees to active status on the payroll, but the men remain free to do as they please with their time.[5] Whether, as represented by plaintiff's New York counsel, these men would really rather be working is not relevant. The point is that insofar as the employer is concerned this measure is entirely punitive, as it requires a substantial outlay of wages for no benefit in return.

While punitive in effect, however, this is not necessarily injustice. Had the employer proceeded initially to bargain with the Union over the leasing of the Elevator, as found by the Court of Appeals to have been required by the Railway Labor Act, it would have received labor in return for its outlay in wages. And, it would not have found itself in the position of having to pay ex-employees to stand idle.

That the employer believed in good faith that it had the right to proceed as it did with the lease of the elevator is not in issue. It has been conclusively determined that

[5] Transcript of proceedings March 29, 1967, pp. 127 *et seq.*

this action was in violation of the Railway Labor Act. All that remains is to impose such sanctions as are required to put the employees back in the same position as if the employer had complied with the Act, and to negate any windfall which the employer may have gained by the violation. The reinstatement of the employees effectively restores their status and position to what it was in July, 1964. As mentioned earlier, the employer must not only bargain as required by the Act; it must now retain persons on its payroll from whom it can receive no labor in return. Further, in view of the injunction herein to be granted, an end to its difficulties cannot be foreseen with certainty. These are difficulties which could have been avoided had the Act not been violated in the first instance, but their very existence positively negatives any windfall to the employer. Surely this is the sanction for which the Court of Appeals searched in my action of June 20, 1966.

Back wages and benefits which have accrued under the Agreement, however, must be placed in an entirely different category from such sanctions. That such wages may have accrued is due in no way to any violation by the employer of the Railway Labor Act or of any other legal authority. To the direct contrary, this condition can be attributed solely to *compliance* by the employer with legal authority—to-wit, the decisions of this Court.

Without re-tracing the history of the case, it can be said that the defendants have evidenced as much frustration with this Court's decisions as has the Union. I know of no reason why this current action should present an exception. In fact, counsel for defendants, at the last hearing, expressed sincere concern with my prior decision that back wages be initially determined before the Railroad Adjustment Board in the following language:

> "Judge, I am fully convinced that if in your second opinion instead of saying we go to the Railroad Adjustment Board to determine whether we get—give the sixty days pay, if you had ordered sixty days pay

and negotiations, it would have been affirmed because the Court just says you did not apply sanctions . . ." (transcript, page 101)

Thus, while neither side has fully approved the decisions of this Court, both have channelled their expressions of disagreement within procedures provided by law. See: Dissenting Opinion of Justice Frankfurter in *United States* v. *Mine Workers,* 330 U.S. 258 (1947). An incidental but inevitable result of this drawn out proceeding has been the continuing accrual of back wages and benefits under the Agreement. The accrual of these wages constitutes a *by-product of the lengthy litigation,* however, as distinguished from a result of the employer's violation of the Act. Certainly no blame whatsoever can be attached to defendants for the fact that back wages have accrued—in fact, it was only by fiat of this Court entered March 20, 1967, and re-affirmed today, that the extension of the contract was established. I, therefore, conclude that, while these facts were deemed appropriate for the imposition of sanctions, it had never been intended by the Court of Appeals that back wages were properly to be included among such sanctions. It follows then that the reference of back wages to the Railroad Adjustment Board in my action of June 20, 1966 was not disapproved by the Court of Appeals.

As mentioned earlier, my departure on March 20, 1967, from my decision of June 20, 1966 that the initial determination of what back wages and benefits are due under the Agreement should be made by the Railroad Adjustment Board, was caused solely by my conclusion that reference to the Board had been specifically disapproved by the Court of Appeals. Having now decided that this was not the correct interpretation of the mandate, it follows that I must and hereby do set aside that part of my action of March 20, 1967 under paragraph *Third* of the order, wherein back wages were ordered to be paid according to guidelines formulated in said action. I return to and re-

assert my decision of June 20, 1966 that jurisdiction to make the initial determination as to what back wages and benefits are due under the Agreement is vested solely in the Railroad Adjustment Board by the Railway Labor Act. In view of the long history of this litigation, however, further amplification of my reasons for this decision is appropriate.

The major dispute found by the Court of Appeals to exist here concerns the leasing of the elevator, and this alone. It has now been settled by the Court of Appeals for the Fifth Circuit that the Railway Labor Act requires this issue to be negotiated under the provisions of "Section 6" thereof before it can ever be put to rest. The sole reason for this lawsuit is found in the honest but mistaken belief held by the Carrier at the critical time, that such negotiations were not required. This belief resulted in the discharge of the employees on whose behalf plaintiff filed this lawsuit. By ordering reinstatement and bargaining these parties have been restored to the relative positions which they occupied on July 31, 1964. It is true that the lease has not been unscrambled and that the elevator is now being operated by an entity not subject to the Act. But the critical factor is the relative strength of the Carrier and Union at the bargaining table. By this Court's action today, the Union's relative position has been improved over what it would have been had bargaining proceeded in August, 1964. The reason for this is that the Union has the positive benefit of an injunction.

When compared to the time consumed by this litigation, the time to be consumed in "Section 6" proceedings is ephemeral. It is not disputed in the record that at the time the employees were discharged, the Carrier was losing money and that it could not afford to continue to operate the Elevator. Had bargaining proceeded in the summer of 1964, it could have consisted of little more than observation of the formalities. But with the injunction herein to be ordered, the Union will have gained substantial leverage

at the bargaining table. True, the injunction is arguably required by law, but the question is close indeed. The decisive factor which has tipped my decision was equitable in nature. I find in the injunction a device by which the Union may be compensated, albeit perhaps a little over-compensated, for the fact that Port Richmond is operating the elevator. Thus, not only do these measures complete the restoration of the *status quo*, the Carrier has been rather severely punished for having misinterpreted the Act—perhaps more severely punished than actually required by the mandates to this Court.

The accumulation of back wages, however, is neither a permissible subject for "Section 6" bargaining nor should they be awarded in the nature of a sanction. No one suggests that the finding by the Court of Appeals that a "major" dispute exists over the leasing of the elevator precludes there also being a "minor" dispute between the same parties involving different subject matter. The Carrier has not spoken to the precise issue, but the Union's concurrence is inherent in language contained in its most recent motion of April 5, 1967 concerning its claims under the Seafarer's Welfare Plan.

In the latter, the Union acknowledged that its claim, which is asserted to arise under the same basic instrument as do back wages, "may well be a minor dispute under the Railway Labor Act." In this same view, plaintiff's New York counsel, in open court March 29th, answered the Court's question as to whether reliance on a contract is inconsistent with a major dispute under the Act, by saying:

> "It may well be Your Honor. It possibly is we have a remedy to go through, it may be a minor dispute." (Transcript, page 121)

The distinction between major and minor disputes under the Railway Labor Act was mentioned in *Missouri-Kansas-Texas RR. Co.* v. *Brotherhood of Loc. Eng., supra,* which

case has been discussed at length here. In *M-K-T* the Court of Appeals stated:

> "The differences between major disputes which must still be settled through traditional processes of agreement and minor disputes which the National Railroad Adjustment Board has been empowered finally to resolve has been elaborately discussed in Elgin, J. & E.R. Co. v. Barley, 1945, 325 U.S. 711, 722 et seq., 65 S.Ct. 1282, 89 L.Ed. 1886, from which we quote briefly:
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> > 'The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.
> >
> > 'The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a particular situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries. In either case **the claim is to rights accrued,* not merely to have new ones created for the future.' "
> >
> > *(emphasis added)

Plaintiff's effort to recover back wages and benefits here is clearly a claim to "rights accrued" and, therefore, a minor dispute relegated to the Railroad Adjustment Board under the authority quoted above. See also: *Brotherhood of Locomotive Firemen and Enginemen* v. *Florida East Coast Ry. Co.*, 346 F.2d 673 (5th Cir. 1965); *Aaxico Airlines, Inc.* v. *Airlines Pilots Ass'n., Intern.*, 331 F.2d 433

(5th Cir. 1964), cert. denied 379 U.S. 933, re-hearing denied 379 U.S. 985. The subject of back wages is one properly to be determined by the Railroad Adjustment Board. *Louisville & N.R. Co.* v. *Brotherhood of Locomotive Engineers,* 297 F.2d 608 (6th Cir. 1961), *cert. denied* 370 U.S. 908, affirmed 373 U.S. 33; *Broady* v. *Illinois Cent. R. Co.,* 191 F.2d 73 (7th Cir. 1951).

I mentioned earlier that both parties encountered problems in their attempt to compute back wages under the guidelines formulated by this Court. I did not, however, specify the exact nature of these problems. Illustrative of such problems is the following statement made by plaintiff's New York counsel at the March 29th hearing:

> "Your Honor, there is a question which does bother me about your back pay order, . . . and that is whether each year should be taken as a separate year of earnings . . . or whether it should be collective.
>
> "Under the NLRB procedures as I understand them, in computing back pay the Board takes a quarter of what the person would have earned on that quarter from the employers less what he did earn from other employment.
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> "I do not understand your order except what I would question whether your order would mean to take the whole sum and then subtract, and if you take the whole sum where does the interest figure come in. You state in your order six per cent per annum. Six per cent per annum is one year. Because I could see a situation where an employee might earn more than we would on the wharves one year and less the following year." (transcript page 118)

The employer has also encountered difficulty with the Court's guidelines. I had specified that *actual* earnings during the interim period were to be deducted from back wages paid. Defendants ask if a similar setoff would not be allowed where losses were *wilfully* incurred (where a discharged employee simply made no effort to find other

work)? While I had not considered such a provision, I find the authority on this point cited by defendants in their brief of March 29th persuasive. Defendants also point out to the court in their brief that several of the discharged employees would have retired during the interim period. Defendants assert, and perhaps reasonably, that it is "self-evident" that the Court's order should not be applicable to such persons. The point is that these problems had not been foreseen, and that further study by the Court would be required to provide answers.

That a Court would likely encounter difficulty when venturing into such a specialized field, exactly as has happened here, has been foreseen by Congress. To alleviate this difficulty it has purposely created the Railroad Adjustment Board. This Board is an agency comprised of persons expert in dealing with questions which arise under the minor disputes provisions of the Act. Due to this expertise the Board has a competence in this area which is simply not possessed by the Courts. The intended net result of this Congressional policy expressed through the Railway Labor Act is twofold: first, that a minimum responsibility be placed upon the Courts in matters where they are ill-equipped to act; and, second, to insure a just result by placing responsibility for making the initial determination in the hands of experts. See: *Order of Conductors* v. *Pitney,* 326 U.S. 561 (1946); *General Committee* v. *M.K.T. R. Co.,* 320 U.S. 323 (1943); *Ramsey* v. *Chesapeake & O.R. Co.,* 75 F. Supp. 740 (N.D. Ohio 1948).

I have concluded, therefore, upon the foregoing reasoning, that this Court is without jurisdiction to award back wages and benefits which may have accrued under the agreement. *St. Louis, S.F. & T.Ry. Co.* v. *Railroad Yardmasters of America,* 328 F.2d 749 (5th Cir. 1964), *cert. denied* 377 U.S. 980. Even, however, if such jurisdiction should exist, I find this to be a suitable instance for application of the doctrine of primary jurisdiction. This doctrine, as defined in *U.S.* v. *Philadelphia Nat. Bank,* 374 U.S.

321 (1963), requires judicial abstension in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme.

I turn now to plaintiff's request that this Court reconsider its denial on March 20, 1967, of injunctive relief under 28 U.S.C.A. Section 2283. As indicated earlier, I have decided to grant this request of the Union. In view of the language from *California* v. *Taylor,* 353 U.S. 553 (1957), quoted in this Court's Memorandum and Order of March 20, 1967, I see this as a very close question. The *Taylor* case is distinguishable in one regard, however. The Court in *Taylor* relied upon *City of Los Angeles* v. *Los Angeles Bldg. & C.Tr. Council,* 210 P. 2d 305 (Cal.App.2d 1949) for its conclusion that the employees of a Belt Railroad owned and operated by the State of California would have no legal right to strike under state law. In *City of Los Angeles* the appellate court affirmed the injunction of a strike against the Water and Power Departments of Los Angeles on the ground that this strike against the city would amount to a strike *against government itself.* Quoting from *Congress of Industrial Organ* v. *City of Dallas,* 198 S.W. 2d 143 (Tex. Civ. App. 1946), that Court upheld the view that:

> "The formidable and familiar weapons in industrial strife and warfare—the strike—is without justification when used against the Government. When so used it is rebellion against constituted authority. . . . To hold otherwise would be to sanction control of governmental functions not by law, but by men." (198 S.W. 2d at 145)

Thus the City of Los Angeles was likened to the *sovereign.* Further, it was decided that furnishing water and electricity to the inhabitants of the city was a *public function.*

Under Texas law, however, the City of Galveston does not stand in the shoes of the sovereign. As stated in *City*

of Galveston v. *Posnainsky*, 62 Texas 118 (1884) at page 126:

> "Counties and like *quasi* corporations are created by the legislature by general laws without reference to the wish of their inhabitants, and thus for essentially public purposes.
>
> "Not so with towns and cities which are incorporated through special charters, which, like most special laws, are enacted at the request of those who are to be most directly benefited by them and with a view to this end. "The one is created for a public purpose as an agency of the state through which it can most conveniently and effectively discharge the duties which the state, as an organized government, assumes to every person, and by which it can best promote the welfare of all. "The other, while to a given extent created for a public purpose, is so mainly for the reason that the existence of large towns and cities makes a system or degree of police there necessary which is not so in villages nor with a rural population; **but the main and essential purpose for which they are created is the advantage of the inhabitants of the corporation. . . .*"
> *(emphasis supplied)

Thus, the City of Galveston stands neither in the shoes of the sovereign as an agent of the State nor, certainly insofar as the operation of its railroad facility is concerned, is it performing a public function. That these considerations are not pertinent under Art. 5154c(3) V.A.C.S. is not controlling here. My concern is with whether the City of Galveston is exempt from the application of the Norris-La Guardia Act, 29 U.S.C.A. Sections 101 *et seq.*, within the meaning of *United States* v. *United Mine Workers*, 330 U.S. 258 (1947).

With certain exceptions not applicable here, Norris-LaGuardia provides that "No Court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute . . ." 29 U.S.C.A. Section 101. The Act further states that "A case shall be held to

involve or to grow out of a labor dispute when the case involves *persons* who are engaged in the same industry. . . ." 29 U.S.C.A. Section 113. The majority reasoned in *Mine Workers* that because Congress made express provision for the term *person* to extend to partnerships, corporations and associations that its silence as to sovereign governments implied that Congress did not desire the term to extend to them. Thus, if the City of Galveston should be considered a *sovereign* within the meaning of *Mine Workers,* then neither the purpose of the Railway Labor Act, as defined in plaintiff's brief on March 1st, nor a judgment of this Court could be served by enjoining defendants from availing themselves of the state court injunction.

I conclude, however, from *Posnainsky* that Galveston is not such sovereign and that Norris-La Guardia would effectively bar this Court from granting injunctive relief such as has been granted by the Texas District Court in Galveston. I further conclude that this relief afforded defendants by the state court tends to frustrate the federal labor policy as expressed through the Railway Labor Act. *Brotherhood of Railroad Trainmen, Enterprise Lodge No. 27* v. *Toledo P. & W.R.R.,* 321 U.S. 50 (1944); *Brotherhood of Railroad Trainmen* v. *Chicago R. & I.R. Co.,* 353 U.S. 30 (1957); *Brotherhood of Locomotive Firemen and Enginemen* v. *Florida East Coast Ry. Co.,* 346 F.2d 673 (5th Cir. 1965). I am also of the opinion that the injunctive relief requested by plaintiff constitutes an appropriate sanction under the mandate from the Court of Appeals. Pursuant to the power vested in this Court under 28 U.S.C.A. Section 2283, defendants are, therefore, enjoined from enforcing, giving continued effect to or availing themselves in any manner whatsoever of the benefits of the State Court injunction. See: *Capital Service, Inc. et al* v. *N.L.R.B.,* 347 U.S. 501 (1954); *Jacksonville Blow Pipe Company* v. *Reconstruction Finance Corp.,* 244 F.2d 394 (1957). Plaintiff's counsel will prepare and submit, after affording defend-

ants the opportunity of inspection, an appropriate order effecting this injunctive relief.

All portions of this Court's Memorandum and Order of March 20, 1967 not inconsistent with the action taken herein shall, of course, remain effective. The stay of that Action on March 29th pending determination of plaintiff's motion for reconsideration is, of course, lifted. One date contained therein requires revision. The April 10, 1967 set for commencement of actual bargaining is hereby changed to May 15, 1967.

The Clerk shall record this Memorandum and Order and shall send a copy to each counsel named herein, to the local counsel for the National Labor Relations Board, and to the Executive Secretary of the National Mediation Board at Washington D.C.

DONE at Houston, Texas on this 3rd day of May, 1967.

/s/ JAMES NOEL
United States District Judge

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25081

UNITED INDUSTRIAL WORKERS OF THE SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES and INLAND WATERS DISTRICT, MARINE ALLIED WORKERS DIVISION, AFL-CIO, *Appellant*,

versus

BOARD OF TRUSTEES OF GALVESTON WHARVES and THE CITY OF GALVESTON, TEXAS, *Appellees*.

(AND REVERSE TITLE)

Appeals from the United States District Court for the Southern District of Texas

(August 8, 1968)

Before JONES, WISDOM, and THORNBERRY, Circuit Judges.

WISDOM, Circuit Judge: This appeal is from an order of the district court (1) denying the backpay demand of the United Industrial Workers of the Seafarers International Union (Union) and (2) enjoining the Board of Trustees of the Galveston Wharves (Carrier) from availing itself of a state court injunction against the Union. The case presents a difficult problem of appropriate relief under the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, and involves the power

of a federal court to enjoin state proceedings under 28 U.S.C. § 2283.

The Carrier and the Union operated under a collective bargaining agreement expiring September 30, 1964. July 31, 1964, the Carrier leased its jurisdictional facilities to the Port Richmond Elevator Company, resulting in the permanent lay-off of thirty-four employees.[1] The Union sued under the Railway Labor Act §§ 2, 6, 45 U.S.C. §§ 152 Seventh, 156,[2] seeking an injunction against the Carrier's consummating the lease pending compliance with the Act's provisions and restoration of the status quo existing before the lease. The district court, viewing the dispute as a "minor dispute", relegated the Union to the Railway Adjustment Board for remedial relief. On appeal,[3] we held the dispute to be "major"[4] and remanded the case to the district court for imposition of "some suitable relief and sanction . . . so that bargaining about this operational termination, now so long delayed, may go forward." 351 F.2d at 191-92. We observed: "There is no pretense that § 6 was complied with. Under those circumstances the Union, and

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[1] The complete facts are set out in this Court's opinion, *United Industrial Workers of the Seafarers International Union* v. *Board of Trustees of the Galveston Wharves*, 5 Cir. 1965, 351 F.2d 184-86.

[2] 45 U.S.C. § 152, Seventh reads:

> No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

The relevant portion of 45 U.S.C. § 156 is set out in our opinion below in part IB(4).

[3] 351 F.2d 184.

[4] The major-minor terminology was evolved in *Elgin, Joliet & E. Ry.* v. *Burley*, 1945, 325 U.S. 711, 65 S.Ct. 1282, 89 L.Ed. 1886. See generally *Rutland Ry.* v. *Brotherhood of Locomotive Engrs.*, 2 Cir. 1962, 307 F.2d 21; Comment, Enjoining Strikes and Maintaining the Status Quo in Railway Labor Disputes, 31 J. Air L. & Comm. 371 (1965).

perhaps the National sovereign, became entitled to effective judicial relief to assure fulfillment of this national labor policy." 351 F.2d at 190.

On remand, the district court again relegated the Union to the Railway Adjustment Board for backpay, merely requiring the parties to bargain in good faith. Again, on appeal, we held that "this order did not provide the *suitable relief and sanction* that this Court found to be not only appropriate but necessary." *United Industrial Workers* v. *Board of Trustees,* 5 Cir. 1966, 368 F.2d 412, 413.[5] Again we remanded the proceedings, leaving details of relief "to the sound discretion of the District Judge."

On the second remand, the district court ordered the parties to bargain and enjoined the Carrier from seeking a state injunction against the Union. But for the third time, the court refused to grant backpay to the discharged employees.[6] The Court asserted that there is no authority for a district court to make a backpay award; such an award

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[5] We further stated:

> The District Court apparently mistook the breath of the discretion afforded it for the existence of discretion, for the discretion granted the District Court was not whether to restore the status quo but only *how* to restore it. There must be an impact on the duty to bargain to prevent the employer from getting a windfall for having violated the Act, while protecting the employees' benefits against the lapse of time. While we did not foreclose the possibility that the lease might have to be unscrambled—a literal restoration of the status quo—we felt that something less could be substituted, so long as the employees were put substantially in the same position as if Galveston Wharves had complied with the Act. 368 F.2d at 413.

[6] In a Memorandum and Order of March 20, 1967, the district judge required bargaining, ordered reinstatement of the laid-off employees, ordered backpay to be paid to those employees, and denied the Union's request for an injunction. Both parties filed various motions with the district court, and a supplemental hearing was granted. May 3, 1967, the district judge handed down the Memorandum and Order from which this appeal is taken.

may be made only by the duly authorized administrative agency, here the National Railroad Adjustment Board.[7]

On appeal, the Union contends that "suitable relief and sanction" can be imposed—and the status quo maintained—only by inclusion of a backpay award in the district court's judgment. The Carrier crossappeals, contending that the district court was without power to enjoin the enforcement of a state court injunction against the Union. We affirm the issuance of the injunction, but reverse and remand on the backpay issue. We conclude that the district court has authority to require payment of backpay as a sanction for the Carrier's having violated Section 6 of the Railway Labor Act.

I.

A. The district court correctly read the object of our prior mandates—"to impose such sanctions as are required to put the employees back in the same position as if the employer had complied with the Act, and to negate any windfall which the employer may have gained by the violation." The court felt, however, that its order requiring the Carrier to bargain and to reinstate the employees during bargaining constituted sufficient sanctions. We agree that

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[7] The district court recognized that the mandate of this Court required "imposition of sanctions which directly inure to the benefit of the particular employees discharged", but it regarded the backpay issue as a "minor dispute", wholly within the jurisdiction of the Railroad Adjustment Board: "Exclusive jurisdiction is vested by this Act in the Railroad Adjustment Board to initially determine matters which require the application of a bargarining agreement, as does the question of back wages here. . . . No one suggests that the finding by the Court of Appeals that a "major" dispute exists over the leasing of the elevator precludes there also being a "minor" dispute between the same parties involving different subject matter. . . . Plaintiff's effort to recover back wages and benefits here is clearly a claim to "rights accrued" and, therefore, a minor dispute relegated to the Railroad Adjustment Board under [the Railway Labor Act as interpreted in *Elgin, Joliet & E. Ry.* v. *Burley*, 1945, 325 U.S. 711, 722, 65 S.Ct. 1282, 89 L.Ed. 1887.

the employer, having violated the Act, must now bargain with the Union and must reinstate the discharged employees *during bargaining;* we do not agree that these are "sufficient" sanctions.

(1) "The legislative history [of the Railway Labor Act] indicates that when the rail unions and carriers agreed upon these provisions, the unions surrendered their right to strike pending exhaustion of major dispute procedures in exchange for a statutory provision restraining management from disturbing the status quo" [8] *Rutland Ry.* v. *Brotherhood of Locomotive Engrs.,* 2 Cir. 1962, 307 F.2d 21, 43 (Marshall, J., dissenting). These "freeze" [9] or "cooling-off" [10] provisions "read together, cover the duration of major dispute proceedings":

> Under § 6 no change in rates of pay, rules, or working conditions can be made *by the carrier* from the time notice of an intended change has been given, or conferences with respect thereto have been begun, or the services of the Mediation Board have been requested or offered, until the controversy has finally been acted upon by the NMB, unless ten days elapse after the

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[8] The object of Section 6

> is to maintain the status quo pending the expiration of the period provided by the section for allowing the process of negotiation, mediation and conciliation to have play. It is to prevent changes being made until these processes have been exhausted or the prescribed waiting period has expired without bringing them into play. *Order of Railway Conductors* v. *Pitney,* 1946, 326 U.S. 561, 569-70, 66 S.Ct. 322, 90 L.Ed. 318, 324-25 (dissenting opinion).

On the maintenance of the status quo pending Adjustment Board resolution of *minor* disputes see *Westchester Lodge 2186* v. *Railway Express Agency, Inc.,* 2 Cir. 1964, 329 F.2d 748, 752-53.

[9] *Chicago, R.I. & Pac. Ry.* v. *Switchmen's Union,* 2 Cir. 1961, 292 F.2d 61, 66.

[10] 67 Cong. Rec. 4648, 4650.

termination of conferences without a request for or proffer of NMB services. If after the NMB has entered the dispute the parties fail to come to an agreement and arbitration is refused, § 5 First provides that for thirty days after notification by the NMB that its efforts have failed "no change shall be made in rates or pay, rules, or working conditions or established practices in effect prior to the time the dispute arose," unless during that period the parties agree to arbitration or an emergency board is created. Section 10 provides that from the time an emergency board is created until thirty days after the board makes its report to the President "no change, except by agreement, shall be made *by the parties to the controversy* in the conditions out of which the dispute arose." (Emphasis added.) Comment, Enjoining Strikes and Maintaining the Status Quo in Railway Labor Disputes, 60 Colum. L. Rev. 381, 388 n. 50 (1960).

Literally, of course, maintenance of the status quo in the instant case would have required a return to operation of the elevator by the Carrier. However, feeling that the employees involved in this major dispute could be adequately protected with less, we suggested that "we need not direct that the lease be unscrambled at this time." [11] 351 F.2d at 191. The first step in returning to the status quo is required bargaining between the parties. *Brotherhood of R.R. Trainmen* v. *Chicago River & Ind. R.R.*, 1957, 353 U.S. 30, 33, 77 S.Ct. 635, 1 L.Ed. 2d 622, 625. The purposes of the Act point unequivocally in this direction; in both minor and major matters, the Act is designed "to provide for the prompt and orderly settlement of all disputes." 45 U.S.C. § 151a. "In both types of disputes the Act requires

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[11] Of course, this Court has the power to require that the lease be unscrambled and that the terminated operations be resumed. See the cases arising under the National Labor Relations Act, discussed in Forkosch, A Treatise on Labor Law §§ 435, 525 1965).

that, as a first step, the parties must make every reasonable effort to settle their differences in conference. § 2 First, Second . . . 45 U.S.C.A. § 152 First, Second." *Rutland Ry.* v. *Brotherhood of Locomotive Engrs.*, 307 F.2d at 31. "Thus, one of the statute's primary commands, judicially enforceable, is found in the repeated declarations of a duty upon all parties to a dispute to negotiate for its settlement. . . . *Virginia R. Co.* v. *System Federation, R. E. D.* [1937] 300 U.S. 515, 91 L.Ed. 789, 57 S. Ct. 592; cf. *Switchmen's Union of N. A.* v. *National Mediation Bd* [1943], 320 U.S. 297, 300, 320, 88 L.Ed. 61, 74, 64 S. Ct. 95; *General Committee of Adjustment, B. L. E.* v. *Missouri-Kansas-Texas R. Co.* [1943], 320 U.S. 323, 334, 88 L.Ed. 76, 81, 82, 64 S. Ct. 146." *Elgin, Joilet & E. Ry.* v. *Burley,* 325 U.S. at 721 n. 12.[12] It is threfore understood that, as the district court ordered, "both sides are to proceed in good faith to bargain as provided under the 'major disputes' provision of the Railway Labor Act." Memorandum & Order of the district court, March 20, 1967.

(2) But for the unilateral change of "working conditions" by the Carrier through the leasing of the elevator facilities, the Carrier-employee relationship would have continued throughout the bargaining period. Thus, maintenance of the status quo requires reinstatement of the

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[12] As stated in *Virginian Ry.* v. *System Federation No. 40,* 1937, 300 U.S. 515, 548, 57 S.Ct. 592, 81 L.Ed. 789, 799:

> The statute does not undertake to compel agreement between the employer and employees, but it does command those preliminary steps without which no agreement can be reached. It at least requires the employer to meet and confer with the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences—in short, to enter into a negotiation for the settlement of labor disputes. . . .

Accord, *Brotherhood of Ry. & Steamship Clerks* v. *Association for the Benefit of Non-Contract Employees,* 1965, 380 U.S. 650, 85 S.Ct. 1192, 14 L.Ed.2d 133.

discharged employees during the bargaining period.[13] This the district court also ordered.

B. The principal dispute in this case focuses on whether the thirty-four employees laid off should receive backpay for the period between their discharge and commencement of bargaining. The parties have cited, and we have found, no cases dealing with this precise problem. The district court concluded that "the finding by this Court of Appeals that a 'major' dispute exists over the leasing of the elevator" does not preclude "there also being a 'minor' dispute between the same parties involving different subject matter." "Plaintiff's effort to recover back wages and benefits here is clearly a claim to 'rights accrued'[14] and, therefore, a minor dispute relegated to the Railroad Adjustment Board. . . ." The court went on to suggest that "this Court is without jurisdiction to award back wages and benefits which may have accrued under the agreement." We disagree.

(1) The court below suggested that "jurisdiction to make the initial determination as to what back wages and benefits are due under the Agreement is vested solely in the Railroad Adjustment Board by the Railway Labor Act." Moreover, the district court concluded that payment of backpay was not a "sanction" ordered by this Court on

[13] On reinstatement during bargaining pursuant to an order arising under the National Labor Relations Act see M. Forkosch. A Treatise on Labor Law § 522 (1965); 31 Am. Jur., Labor § 306 (1958).

[14] The term "rights accrued" originated in this context in *Elgin, Joliet & E. Ry.* v. *Burley*, 1945, 325 U.S. 711, 722, 65 S.Ct. 1282, 89 L.Ed. 1886. The Court characterized "major" disputes as relating "to disputes over the formation of collective agreements or efforts to secure them," and "minor" disputes as being "founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement. . . . [T]he claim is to rights accrued, not merely to have new ones created for the future."

the earlier appeals. As we have noted, however, the purpose of the relevant sections of the Act is maintenance of the status quo pending conference. The employees wrongfully laid off cannot be retroactively reinstated, but they can be retroactively compensated. This does not punish the Carrier. Nor does it constitute a windfall to the employees. It is the price of reconstructing the status quo; it compensates the employees for the losses incurred by their being laid off in violation of the Act.

To this extent the remedy is similar to that imposed by statute, the National Labor Relations Act, when employees have been discharged following the employer's refusal to bargain in violation of that Act. Thus, in *NLRB* v. *Winn-Dixie Stores, Inc.*, 5 Cir. 1966, 361 F.2d 512, the Company discontinued certain operations—resulting in the lay-off of six employees—without prior bargaining with the Union. Although this Court refused to require the Company to bargain with the Union over reestablishment of the discontinued operations, we enforced the Board's order requiring the Company to make the discharged employees "whole for any loss of pay suffered by them." 361 F.2d at 515. Accordingly, the order provided that

> the back pay liability should cease upon the occurrence of any of the following conditions: "(1) reaching mutual agreement with the Union relating to the subjects which Respondent is herein required to bargain about; (2) bargaining to a *bona fide* impasse; (3) the failure of the Union to commence negotiations within 5 days of the receipt of the Respondent's notice of its desire to bargain with the Union; (4) the failure of the Union to bargain thereafter in good faith." 361 F.2d at 515 n. 6.

Similarly, in *NLRB* v. *American Mfg. Co.*, 5 Cir. 1965, 351 F.2d 74, the Company discontinued trucking operations without bargaining with the Union. The Board ordered not only reinstatement and backpay, but resumption of the trucking operations. This Court observed that "[s]ince we

order back pay and reinstatement of the employees, the Union has persons to bargain for. It does not need trucks to bargain for the men." 351 F.2d at 80-81. We did enforce that portion of the Board's order requiring the Company to "[o]ffer reinstatement to all discharged drivers to their former or substantially equivalent positions; and . . . [p]ay drivers back pay from the date of discharge with interest at 6 percent per annum." 351 F.2d at 76. See also *Town & Country Mfg. Co.* v. *NLRB*, 5 Cir. 1963, 316 F.2d 846.

Both parties and the district court devote considerable discussion to the M-K-T case, *Brotherhood of Locomotive Engrs.* v. *Missouri-Kansas-Texas R.R.*, 1960, 363 U.S. 528, 80 S.Ct. 1326, 4 L.Ed.2d 1379. In *M-K-T* the district court granted an employer-requested injunction against a union strike over a minor dispute. But the court conditioned this injunction upon the employer's maintenance of the status quo pending resolution of the dispute by the Adjustment Board or, alternatively, payment of the affected employees if the contested changes were put into effect prior to the Board's determination. Under the Railway Labor Act an employee strike in breach of contract, a minor dispute, is enjoinable; the adjustment provisions of the statute constitute "compulsory arbitration". *Brotherhood of R.R. Trainmen* v. *Chicago River & Ind. R.R.*, 1957, 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed.2d 622. The court realized the serious dislocation of employees that would occur, were the Carrier to put the changes sought into effect. The Court concluded that despite the patent illegality of the employees' strike threat, it could as a matter of equity condition the use of its injunctive powers against the employees on employer maintenance of the status quo *or the interim payment of the employees.* The court of appeals reversed.[15] The Supreme Court reversed the court of appeals and endorsed the position of the district court. The lesson *M-K-T* teaches is that in a minor dispute situation, when the statute says nothing about maintenance of the status quo, the status quo

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[15] *Brotherhood of Locomotive Engrs.* v. *Missouri-Kansas-Texas R.R.*, 5 Cir. 1959, 266 F.2d 335.

may be maintained by freezing the conditions sought to be changed by the Carrier *or by allowing the change but requiring the Carrier to continue to pay the affected employees.* We observe, first, that the case before us involves a *major* dispute. The Act explicitly mandates maintenance of the status quo. Second, the facilities involved here have already been leased, and we have already determined that the lease should not be unscrambled; therefore, the only fair and practicable remedy is payment of the affected employees. This is what we meant when, in footnotes to our earlier opinions, we referred to "the interim wage plan approved" in *M-K-T.*[16]

Backpay is a realistic assurance that there will be "an impact on the duty to bargain to prevent the employer from getting a windfall from having violated the Act, while protecting the employees' benefits against the lapse of time." 368 F.2d at 413. Only backpay will put the employees "substantially in the same position as if Galveston Wharves had complied with the Act." Ibid.

(2) The Carrier's argument against a court-ordered backpay award is two-pronged: First, so the argument goes, the Railroad Adjustment Board has jurisdiction over the backpay award; second, the federal courts are without jurisdiction when such award is involved. We find both assertions erroneous.

The Carrier's error stems from its premise that "[i]f the members of this Union are entitled to back pay, it is because they were wrongfully discharged." The Carrier cites cases holding that in the absence of diversity of citizenship federal courts have no jurisdiction to order backpay for wrongful discharges *arising out of minor disputes.*[17]

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[16] 351 F.2d at 192, n. 29; 368 F.2d at 413 n. 3.

[17] E.g. *Walker* v. *Southern Ry.*, 1966, 385 U.S. 196, 87 S.Ct. 365, 17 L.Ed.2d 294; *Slocum* v. *Delaware, Lackawanna & W. R.R.*, 1950, 339 U.S. 239, 70 S.Ct. 577, 94 L.Ed. 795; *United R.R. Operating Crafts* v. *Northern Pac. Ry.*, 9 Cir. 1953, 208 F.2d 135; *Buster* v. *Chicago, M., St. P. & P. Ry.*, 7 Cir. 1952, 195 F.2d 73.

The court below also treated the backpay issue as constituting a "minor dispute". We acknowledge that a disciplinary discharge in *breach of contract* is remediable either before the appropriate adjustment board or, upon the employee's election, in a damage action[18] where permissible under state law in state or, if diversity existis, in federal courts. But the employees here do *not* claim backpay for a breach of contract. Their claim arises out of a violation of the federal statute. The contract-dispute cases therefore are not relevant.

The National Railroad Adjustment Board does not have jurisdiction over the backpay issue. In their contract the parties before us provided for a system board of adjustment in accordance with § 3, Second of the Railway Labor Act.[19] The system board, not the National Board, would have exclusive jurisdiction were a minor dispute involved. *Sigfred* v. *Pan American World Airways*, 5 Cir. 1956, 230 F.2d 13, cert. denied, 351 U.S. 925, 76 S.Ct. 782, 100 L.Ed. 1455; *Primakow* v. *Railway Express Agency*, D.C. Wis. 1943, 56 F. Supp. 413; see *International Ass'n of Machinists, AFL-CIO* v. *Central Airlines, Inc.*, 1963, 372 U.S. 682, 83 S.Ct. 956, 10 L.Ed.2d 67.[20] But a minor dispute is not involved. This is not a grievance dispute, nor a matter of interpretation or application of a collective bargaining agreement. These are the issues over which the Adjustment Board has exclusive jurisdiction under the terms of the

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[18] *Moore* v. *Illinois Central R.R.*, 1941, 312 U.S. 630, 61 S.Ct. 754, 85 L.Ed. 1089; *Walker* v. *Southern Ry.*, 1966, 385 U.S. 196, 87 S.Ct. 365, 17 L.Ed.2d 294. See also Rose, The Railway Labor Act and the Jurisdiction of the Courts, 8 Labor L.J. 9 (1957); Note, 15 Alabama L. Rev. 625 (1963).

[19] See Article X of the contract, providing for a system board pursuant to authority granted in 45 U.S.C. § 153.

[20] On system boards in general see Kroner, Minor Disputes Under the Railway Labor Act: A Critical Appraisal, 37 N.Y.U.L. Rev. 41, 72-74 (1962).

statute.[21] See *Slocum* v. *Delaware, L. & W. R.R.*, 1950, 339 U.S. 239, 70 S.Ct. 577, 94 L.Ed. 795; *International Ass'n of Machinists, AFL-CIO* v. *Central Airlines*, supra; *Gunther* v. *San Diego & Ariz. E. Ry.*, 1965, 382 U.S. 257, 86 S.Ct. 368, 15 L.Ed.2d 308; *United R.R. Operating Crafts* v. *Northern Pac. Ry.*, 9 Cir. 1953, 208 F.2d 135, 137, *cert. denied*, 347 U.S. 929, 74 S.Ct. 531, 98 L.Ed. 1081.

Admittedly, no case has been found where a federal court has awarded backpay as part of its enforcement of the status quo in a major dispute. But given our role in such enforcement, and the peculiar necessity for inclusion of backpay as a sanction under the Act (see part (1) above), we conclude that the Court possesses the power to include a backpay award in its order

(3) We do not deny the particular competency of the administrative board in such proceedings.[22] But court and administrative decisions in backpay cases set out sufficient guidelines to chart our course in these waters.

Since this case is unusual in that it involves court-ordered backpay as a sanction for violation of the Railway Labor Act, we believe it desirable to set out some basic guidelines for the computation of the award. The obvious touchstone is the procedure used by the National Labor Relations Board. Backpay is comprised of the gross earnings which the discharged employee would normally have received

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[21] "The disputes between an employee or group of employees and a carrier or carriers *growing out of grievances or out of the interpretation or application of agreements* concerning rates of pay, rules, or working conditions . . . may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board. . . ." 45 U.S.C. § 153(i).

[22] See *Gunther* v. *San Diego & Ariz. E. Ry.*, 1965, 382 U.S. 257, 86 S.Ct. 368, 15 L.Ed. 2d 308; *Slocum* v. *Delaware, Lackawanna & W. R.R.*, 1950, 339 U.S. 239, 70 S.Ct. 577, 94 L.Ed. 795. See generally Garrison, The National Railroad Adjustment Board: A Unique Administrative Agency, 46 Yale L. J. 567 (1937).

during the applicable period [23] less any net interim earnings computed on a quarterly basis with interest.[24] See *NLRB v. Charley Toppino & Sons,* 5 Cir. 1966, 358 F.2d 94. Of course, a discharged employee is under a duty to make a reasonable effort to secure interim employment to mitigate the damages resulting from his unlawful discharge. *Phelps Dodge Corp.* v. *NLRB,* 1941, 313 U.S. 117, 197-200; 61 S.Ct. 447, 85 L.Ed. 1271; *NLRB* v. *Southern Silk Mills,* 6 Cir. 1957, 242 F.2d 697; *NLRB* v. *Armstrong Tire & Rubber Co.,* 5 Cir. 1959, 263 F.2d 680. The details and relevant cases are set out extensively in Parker, Monetary Recovery Under the Federal Labor Statutes, 45 Texas L. Rev. 881, 887-92 (1967); see M. Forkosch, A Treatise on Labor Law § 524 (1965); W. Wilson, Labor Law Handbook § 309 (1963); 31 Am. Jur., Labor § 309 (1958). See also the district court's Memorandum and Order of March 20, 1967, part THIRD.

The appellant raises questions regarding employer contributions to the Seafarers Welfare Plan[25] and applicability of the backpay order to retired employees. The record has not been developed on these issues. Considering the lengthy litigation that has alrady taken place, we would hope that the parties would enter into a stipulation under the district court's order, as suggested in that court's earlier withdrawn Memorandum and Order of March 20, 1967.[26] If no such

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[23] See part (4) below.

[24] This Court, following the lead of six other circuits, has approved the inclusion of interest on backpay awards. See *NLRB* v. *George Light Boat Storage, Inc.,* 5 Cir. 1967, 373 F.2d 762, 766; see cases from other circuits cited 373 F.2d at 766 n. 4.

[25] The district court did suggest that such contributions were not to be included as sanctions, but in light of our decision on the backpay issue this observation must be reconsidered.

[26] Cf. 29 C.F.R. § 102.52, suggesting that the amount of backpay due pursuant to a court decree or Board order under the National Labor Relations Act should "be resolved without a formal proceeding," that is, through settlement.

stipulation be filed, a master may be appointed under Fed. R. Civ. P. Rule 53 to compute the back wages due after the district court has settled these remaining legal issues.

(4) Judge Friendly has written: "The effect of § 6 is prolong agreements subject to its provisions regardless of what they say as to termination." *Manning* v. *American Airlines, Inc.*, 2 Cir. 1964, 329 F.2d 32, 34. We quoted this language with approval in our first opinion on this case, 351 F.2d 183, 190, n. 26. The Union argues that this means that the backpay period extends beyond the termination date of the contract, September 30, 1964, up to the time the wrongfully discharged employees are reinstated pending bargaining. We agree.

Galveston contests this interpretation of *Manning*. In *Manning* there was a separate contract for the check-off of union dues of engineers who signed a prescribed authorization form. This check-off agreement was to continue in full force through April 30, 1963, "subject to renewal thereafter only by mutual agreement of the parties thereto". The Union gave notice that it desired the check-off dues on May 1. The district court ordered American to resume the check-off.

On appeal American argued that since the check-off agreement had a fixed termination date without self-renewal provisions, Section 6 was inapplicable. The Court replied:

> If the basic agreement of 1958 had no automatic renewal clause § 6 would have nonetheless applied; unless the terms of the agreement were still to be followed there would be "an intended change," which would bring into play the thirty-day notice provision of § 6 and with the requirement of the second sentence that the *status quo* be maintained until compliance with all the demands of the section was had.

The objective of the Railway Labor Act is continuance of the status quo until the statutory procedures of the Act

have been exhausted.[27] This objective would be frustrated if the employer here could avail himself of the contract termination date where it is clear that the employer has not taken the mandatory step of bargaining with the Union on the issue of the contract's renewal. Similarly, the employees can be made whole only by a backpay order encompassing the time which they have been out of work because of the wrongful discharge by the Carrier. That time must be measured without regard to the termination date specified in the contract. As the Supreme Court stated in Order of *Ry. Telegraphers* v. *Railway Express Agency,* 1943, 321 U.S. 342, 347, 64 S.Ct. 582, 586, 88 L.Ed. 788, 792, "the failure of the carrier to proceed as provided by the Railway Labor Act of 1926, then applicable, leaves the collective agreement in force throughout".

The Carrier argues: "What the Court has said we did wrong was not bargaining with the Union with reference to leasing the Elevator. There can be no contention that we refused to bargain with the Union with reference to the expiration of the contract or the extension or rewriting of the contract." However, as we observed earlier, when the Union served notice requesting negotiation on the shutdown or leasing of the elevator, "The Carrier declined, replying that 'It is not possible to reopen the contract under the present conditions.'" 351 F.2d at 186. We cannot, and need not, guess what would have been the result of negotiations at that time. The effect of the Carrier's position was the discharge of employees without negotiations—negotiations required by federal statute. The unlawful discharge of the employees on July 30 did not somehow become lawful on September 30. By the Carrier's very actions, that later date becomes irrelevant; the point of focus required by the Railway Labor Act is the status quo *before* July 30.

NLRB v. *George E. Light Boat Storage, Inc.,* 5 Cir. 1967, 373 F.2d 762, is inapposite. The issue in that case was

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[27] See Part IA above.

whether the Company's overtime and welfare-payment obligations terminated with the expiration date of the contract, where the Company had refused to bargain concerning changes in wages and hours. The Court concluded that "the Company should be ordered to pay back overtime and back welfare fund payments only through the expiration date of the contract. . . . Restoration of the status quo ante which the Act seeks requires no more." 373 F.2d at 771. The Court observed that the Company was almost out of business, and that "In such a situation there is no reasonable probability that had the company respected its statutory duty to bargain with the union, the contract taking effect in 1965 would have contained terms similar to or more favorable to the employees than those of the old contract." 373 F.2d at 770.

We recognize the analogy between the *Light Boat* case and this case in that in both there was only a slight likelihood that the bargaining that the employer refused to engage in would have resulted in continuance of the obligations that the Courts were later to enforce.[28] On the other hand, the Railway Labor Act is more concerned than the National Labor Relations Act with continuance of the employer's operations and the employer-employee relationship. This is evidenced by the fact that while bargaining is the first and last step under the NLRA, it is only the first step under the Railway Labor Act in a ladder that leads to the White House if differences cannot be resolved.[29]

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[28] But note that the items in controversy in *Light Boat* were welfare and overtime payments, not backpay. The two employees discharged in violation of §§ 8(a)(1) and (3) were ordered reinstated with complete backpay. 373 F.2d at 766.

[29] We recognize that the national interest in operation of a grain elevator may be different from the interest in continuance of rail or air service, but the Act makes no such distinction.

The cases cited by the Carrier [30] holding that a court cannot extend or reinstate a contract or contract provision after termination of the contract are not controlling. Those cases arose under the NLRA "[T]he fundamental premises and principles of the Railway Labor Act are not the same as those which form the basis of the National Labor Relations Act. . . ." *Brotherhood of R.R. Trainmen* v. *Chicago River & Ind. R.R.*, 1957, 353 U.S. 30, 31 n. 2, 77 S.Ct. 635, 1 L.Ed.2d 622. Under the NLRA a court simply cannot order compliance with an expired contract. See *NLRB* v. *George E. Light Boat Storage, Inc., supra* at 770. The Railway Labor Act specifies clearly:

> In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, *rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon,* as required by section 155 of this title, by the Mediation Board unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board. 45 U.S.C. § 156.

The Act, therefore, provides explicitly for extension of the rates of pay, rules, and working conditions regardless of the termination date of the contract until *after* conference bargaining between the parties. None has yet occurred by the parties before us. The rates of pay, rules, and working conditions under the original contract thus still stand in

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[30] NLRB v. Cosmopolitan Studio, Inc., 2 Cir. 1961, 291 F.2d 110; *Hobar* v. *United Aircraft Corp.*, 63 L.R.R.M. 2081. *Air Line Dispatchers Ass'n* v. *California Eastern Airways, Inc.*, N.D. Cal. 1954, 127 F. Supp. 521, was a backpay minor-dispute case arising under the Railway Labor Act, and its statement, in a jurisdictional context, that the right extended only to the contract termination date is not here controlling.

theory. In actuality, they do not, since we have deemed it unnecessary to unscramble the lease that brought about the changes, backpay being a sufficient substitute; the backpay obligation of the Carrier must extend to when bargaining begins.

II.

The district court enjoined the defendants from "enforeing, giving continued effect to or availing themselves in any manner whatsoever of the benefits of the state court injunction that was entered in the District Court of Galveston County, Texas, to enjoin the picketing by the members of the Union." The state court injunction was sought on the basis that the Union picketing would violate article 5154c of the Texas Revised Civil Statutes, which makes illegal picketing to induce employees of a city or other political subdivision of the State of Texas to engage in strikes or organized work stoppages.[31]

We agree that Galveston should be enjoined, but we do not rely on that part of the court's reasoning which was grounded upon the applicability of the Norris-LaGuardia Act, 29 U.S.C. § 113, to the facts of this case. The City of Galveston, owner and operator of the elevator facilities, is

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[31] Article 5154c provides: "It is against state public policy for its officials or those of its political subdiivsions to bargain on contract with a labor organization concerning terms and conditions of employment of its employees. Public employees are prohibited from participating in an organized work stoppage or strike under penalty of losing civil service and other rights acquired as a result of their public employment. Employees may individually work without penalty and may present their grievances through a representative that does not claim the right to strike. No person shall be denied public employment because of membership or non-membership in a union." The validity of this statute was upheld in *South Atl. & Gulf Coast Dist. of International Longshoremen's Ass'n* v. *Harris County-Houston Ship Channel Navigation Dist.*, Tex.Civ.App. 1962, 358 S.W.2d 658, writ. ref'd n.re., *cert. denied*, 372 U.S. 975, 83 S.Ct. 1111, 10 L.Ed.2d 142.

a sovereign arm of the State of Texas and is therefore immune from the application of that Act.[32]

The ultimate issue, then, is the applicability of the anti-injunction statute, 28 U.S.C. § 2283, which provides:

> A Court of the United States may not grant an injunction or stay proceedings in a State Court as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

There is no Act of Congress authorizing the injunction in this case; nor is an injunction needed to aid federal court jurisdiction here. But we conclude that the injunction issued by the district court was proper to carry out that court's bargaining order.

Economic action after exhaustion of Section 6 procedures is an integral part of the collective bargaining scheme Con-

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[32] The district court, citing City of Galveston v. Posnainsky, 1884, 62 Tex. 118, observed that "the City of Galveston stands neither in the shoes of the sovereign as an agent of the State nor, certainly insofar as the operation of its railroad facility is concerned, it is performing a public service function." Thus, reasoned the court, Galveston is a person under the Norris-LaGuardia Act; the case grows out of a labor dispute as defined in that Act; and "No Court of the United States . . . shall have jurisdiction to issue any . . . injunction in a case involving or growing out of a labor dispute." 29 U.S.C. §§ 101, 113. Since the federal court could not issue an injunction against picketing in this case, concluded the court, neither can a state court. This entire theory is shattered by the simple observation that *Posnainsky* is no longer good law in Texas: a city in Texas is an arm of the State and is a political subdivision of the State. *City of Goose Creek* v. *Honeycutt*, Tex. Comm'n App. 19 , 39 S.W.2d 617, opinion adopted. Accord, *City of Longview* v. *First National Bank*, 5 Cir. 1945, 152 F.2d 97, *cert. denied*, 327 U.S. 784, 66 S.Ct. 684, 90 L. Ed. 1011; *Supreme Forrest Woodmen Circle* v. *City of Belton*, 5 Cir. 1938, 100 F.2d 655; *Texas National Guard Armory Bd.* v. *McCraw*, Tex. 1939, 126 S.W2.d 627; *Town of Ascarte* v. *Villalobos*, Tex. 1949, 223 S.W.2d 945.

gress prescribed when it enacted the Railway Labor Act. The effect of the state court injunction against a possible Union strike is perhaps to render impotent the duty to bargain imposed by this Court.[33] Texas and Texas courts may not agree with this view, but when the Railway Labor Act is otherwise applicable—as it is here—the Texas view is irrelevant. For the Railway Labor Act preempts all state legislation purporting to regulate the labor relations of covered employees.[34]

In *California* v. *Taylor,* 1957, 353 U.S. 553, 77 S.Ct. 1037, 1 L.Ed.2d 1034, the Carrier, owned and operated by the State of California, contended that the minor disputes provisions of the Railway Labor Act were inapplicable to it and that its labor relations were specifically regulated under state statute. The Supreme Court replied:

> Under the Railway Labor Act, not only would the employees of the Belt Railroad have a federally protected right to bargain collectively with their employer, but the terms of the collective-bargaining agreement that they have negotiated with the Belt Railroad would take precedence over conflicting provisions of the state civil service laws. 353 U.S. at 561, 1 L.Ed.2d at 1039.

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[33] Although not here applicable, the Norris-LaGuardia Act evidences Congressional belief in the freedom of either party to use self help after bargaining has failed.

[34] For example, in the field of grievances—of minor disputes—neither a state nor a federal court has jurisdiction to determine matters of contract interpretation. *Order of Ry. Conductors* v. *Southern Ry.*, 1950, 339 U.S. 255, 70 S.Ct. 585, 94 L.Ed. 811; *Slocum* v. *Delaware, Lackawanna & W. R.R.*, 1950, 339 U.S. 239, 70 S.Ct. 577, 94 L.Ed. 795; *Order of Ry. Conductors* v. *Pitney,* 1946, 326 U.S. 561, 66 S.Ct. 322, 90 L.Ed. 318. It is equally clear that federal, not state, law applies to awards of system boards of adjustment, which are enforceable only in federal courts. *International Assn' of Machinists* v. *Central Airlines,* 1963, 372 U.S. 682, 83 S.Ct. 956, 10 L.Ed. 2d 67.

The Court squarely held that the Railway Labor Act applied to state-owned carriers. Said the Court: "The fact that under state law the employees of the Belt Railroad may have no legal right to strike reduces, but does not eliminate the possibility of a work stoppage. It was to meet such a possibility that the act's 'reign of law' was established." 353 U.S. at 566.

Galveston relies upon *Amalgamated Clothing Workers* v. *Richman Bros.*, 1955, 348 U.S. 511, 75 S.Ct. 452, 99 L.Ed. 600. The Court in that case, however, specifically recognized that "In no lawyer-like sense can the present proceeding be thought to be in aid of the District Court's jurisdiction." 348 U.S. at 519, 99 L.Ed. at 609. The district court simply did not have jurisdiction over the matter in controversy; it had remanded the state cause when first removed to federal court. The court's non-existent jurisdiction therefore cannot be aided." *Ibid.*

More in point is *Capital Service, Inc.* v. *NLRB*, 1954, 347 U.S. 501, 74 S.Ct. 699, 98 L.Ed. 887, a leading case on the "in aid of jurisdiction" exception. A state court had enjoined all picketing arising from a labor dispute; the federal court enjoined only that which violated the National Labor Relations Act. The Board, to cure the conflict and enforce the injunction obtained pursuant to Section 10(1) of the Act, moved to enjoin the employer from giving effect to the state court order. The district court granted the stay as necessary in "aid of its jurisdiction". The Supreme Court granted relief under Section 2283, observing that the federal court must ". . . have unfettered power to decide for or against the Union, and to write such decree as it deemed necessary in order to effectuate the policies of the Act. . . . [To do so] it must be freed of all restraints from the other tribunal. 347 U.S. at 505, 506, 74 S.Ct. at 702-03.

In *NLRB* v. *Schertzer*, 2 Cir. 1966, 360 F.2d 152, the National Labor Relations Board had ordered an employer to pay back wages to an employee in settlement of an unfair labor practice dispute. After the Board issued its order, a

creditor of the employee instituted garnishment proceedings in state court and named the employer as garnishee. The Board then sought enforcement of the backpay order in the Court of Appeals, despite the employer's willingness to comply with the order. The Second Circuit granted a stay of the state court proceedings. The Court held that it had the power to enjoin the stat court under section 2283 "in aid of its jurisdiction" and "to protect and effect its judgments". A commentator suggests that preemption supplied a third and better reason for the federal injunction: the rule that emerges from *Richman* is that when national labor policy is adversely affected by a state proceeding threatening the jurisdiction of the federal court, the federal court may enjoin the state court proceeding. See Comment, Enjoining State Court Proceedings Which Interfere with National Labor Policy, 115 Pa. L. Rev. 590 (1966).

The state court injunction, issued August 11, 1964, enjoined the Union from "picketing the properties of the Galveston Wharves at Galveston", excluding the situs of the Elevator (which apparently was closed anyway.) This was at a time when the Carrier itself was in violation of the Railway Labor Act. The cases suggest that at that time, under the Act, the Union had the right to strike; that right continues until the Act is complied with by the Carrier, and thereafter ceases during and until exhaustion of the procedures set up by the Act.[35]

After discussing the history of and procedures set up in the Railway Labor Act, the Supreme Court, in *Elgin, Joliet & E. R.R. & Burley,* 1945, 325 U.S. 711, 725, 65 S.Ct. 1282, 89 L.Ed. 1887, 1895, said: [C]ompulsions go only to insure that those procedures are exhausted before report can be had to self-help." This position, approved by the

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[35] See *Butte, Anaconda & Pac. Ry.* v. *Brotherhood of Locomotive Firemen,* 9 Cir. 1959, 268 F.2d 54, *cert. denied* , 361 U.S. 864, 80 S.Ct. 122, 4 L.Ed.2d 104; *Brotherhood of R.R. Trainmen* v. *New York Cent. R.R.,* 6 Cir. 1957, 246 F.2d 114, *cert. denied,* 355 U.S. 877, 78 S.Ct. 140, 2 L.Ed.2d 107:

commentators,[36] reflects the conclusion of the district court in a case concerning precisely this problem. *American Airlines, Inc.* v. *Air Line Pilots Ass'n,* S.D.N.Y. 1958, 169 F. Supp. 777. The Union, following extensive proceedings between the Company and the Union—including conferences, mediation by the National Mediation Board, proffer and refusal of arbitration, and a report and recommendations by a Presidential Emergency Board, struck and the Company immediately went to the district court for an injunction. The court concluded that the Company had not established noncompliance with the provisions of the Act by the Union, and denied relief.

After a review of the case history and the Act, the court observed that

> whereas in the case of minor disputes strikes are illegal *per se* because the processes of the Act are final, binding and conclusive throughout and therefore can be enjoined despite Norris-LaGuardia, in the case of a major dispute a strike is not illegal *per se* and cannot be enjoined if the processes of the Railway Labor Act have been complied with and exhausted. 169F. Supp. at 787.

The court concluded that "the parties may not, in the course of a major dispute under the Railway Labor Act, have resort to either the strike or the lockout before the proceedings provided by the Act have been exhausted", 169 F. Supp. at 789, and that because the Union "had performed its duties and obligations under the Railway Labor Act . . . there was nothing to bar a strike." 169 F. Supp. at 798.

In *American Airlines* the parties had completed proceedings under the Act; here the parties have not begun them. But in both cases the Union did all it could to exhaust the procedures of the Act, and that is all that is necessary. One commentator has urged an even broader reading of the

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[36] See Wisehart, The Airlines' Recent Experience Under the Railway Labor Act, 25 Law & Contemp. Probs. 22, 28 (1960); Comment, Enjoining Strikes and Maintaining the Status Quo in Railway Labor Disputes, 60 Colum. L. Rev. 381, 386-89 (1960).

statute, suggesting that under the literal provisions of the Act the Union may strike even without having exhausted the procedures under the Act. For *American Airlines* "did not consider the fact that § 6 applies only to carriers and the sections that could be applied to unions only operate after the conciliatory and mediatory proceedings have failed and the procedures for bringing public opinion to bear on the problem have been initiated. Furthermore, it seems to strain the language of the act to say that the prohibition against changing 'working conditions or established practices,' in § 6, and 'conditions out of which the dispute arose,' in § 10, have reference to strikes."[37] Comment, Enjoining Strikes and Maintaining the Status Quo in Railway Labor Disputes, 60 Colum. L. Rev. 381, 389 n. 51 (1960).

While the other cases dealing with the issue of the propriety of strikes during a major dispute under the Railway Labor Act suggests no clear solution, they appear consistent with *American Airlines*. *Railroad Yardmasters* v. *Pennsylvania R.R.*, 3 Cir. 1955, 224 F.2d 226, held that the Carrier may unilaterally change working conditions only if it has complied with the Act. And *Missouri-Illinois R.R.* v. *Order of Ry. Conductors and Brakemen*, 8 Cir. 1963, 322 F.2d 793, 796, held that no injunction will lie against a Union strike unless the Union has "violated the provisions of the Railway Labor Act," that is, that the Union may strike only if it has complied with the Act. Finally, in a dissenting opinion Judge (now Mr. Justice) Marshall adopted the position that "the conduct of both parties in derogation of the major dispute procedures must be enjoined" . . . "on the grounds that resort to the courts is generally preferable to this kind of self help and on the further grounds that the 'cooling off' policies of the major dispute procedures cannot be effectuated by allowing both parties simply to do away with the Act." *Rutland Ry.* v.

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[37] But see U.S. Emergency Board No. 97, Report to the President 138 (1952), asserting that a work stoppage is prohibited "for a period of 30 days following the date when . . . [an emergency board] is appointed".

Brotherhood of Locomotive Engrs., 2 Cir. 1962, 307 F.2d 21, 45.

It must be kept in mind that

> [t]here is no complusion on the parties to agree at any stage of the procedure. They are not compelled to reach an agreement by collective bargaining, to follow the recommendations of the Mediation Board, to submit to arbitration or to follow any recommendations which a Presidential Emergency Board may make. *American Airlines, Inc.* v. *Air Line Pilots Ass'n, supra* at 784.

Similarly, the parties may not want the services of the National Mediation Board and the Board may not proffer its services. If the carrier refuses to follow the procedures of the Act, or if those procedures are followed to an impasse, the Union may strike. The Union's right to bargain, guaranteed by the Act, 45 U.S.C. § 152, Fourth, and presently enforced by this Court, would be illusory without a right to strike when bargaining has run its course of if the Carrier continues to refuse to bargain. The Railway Labor Act, and the cases interpreting it, only forbid Union striking during the course of exhaustion of the Act's procedures (and during the statutory cooling-off periods after initiation of the proceedings, for 30 days after mediatory efforts have failed, and after creation of an Emergency Board and thirty days thereafter.) The right to strike is adjunct to the Union's statutory rights and implicit in our order. This national labor policy cannot be frustrated by a state court injunction. To effectuate the judgement of the federal court, the district court properly enjoined the Carrier from availing itself of the state court injunction. If the Union is to be enjoined from picketing in the future, it must be enjoined under the Railway Labor Act, not under article 5154c of the Texas statutes; and it is to be enjoined in federal, not state, court.

The district court's judgement is AFFIRMED in part and REVERSED in part, and the cause is REMANDED to the district court for further proceedings consistent with this opinion.

APPENDIX I

170 NLRB No. 158 D-878
Galveston, Texas

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 23-CP-23

UNITED INDUSTRIAL WORKERS OF THE SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICT, AFL-CIO

and

PORT RICHMOND ELEVATOR COMPANY, INC.

Case No. 23-RC-2356

PORT RICHMOND ELEVATOR CO., INC., *Employer*

and

SOUTH ATLANTIC AND GULF COAST DISTRICT, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *Petitioner*

SEAFARER'S INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICT, MARINE ALLIED WORKERS DIVISION, *AFL-CIO, Intervenor* [1]

Decision, Order, and Certification of Representative

On November 29, 1967, Trial Examiner John M. Dyer issued his Decision in Case No. 23-CP-23, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative

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[1] The Respondent in Case No. 23-CP-23 and the Intervenor in Case No. 23-RC-2356 are the same party. Subsequent to the filing of the representation petition, the name of the Union was changed to that as listed in Case No. 23-CP-23.

action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions and a supporting brief.[2]

In Case No. 23-RC-2356, pursuant to a Decision and Direction of Election issued on September 28, 1967, by the National Labor Relations Board, an election by secret ballot was conducted on October 18, 1967, in an appropriate unit under the direction and supervision of the Regional Director for Region 23. At the conclusion of the election, the parties were furnished with a tally of ballots which showed that of approximately 35 eligible voters, 29 cast valid ballots, of which 28 were for the Petitioner and 1 was for the Intervenor. Thereafter, the Intervenor filed timely objections to conduct affecting the results of the election. Pursuant to the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, the Regional Director conducted an investigation and, on November 16, 1967, issued and served upon the parties his Report and Recommendations on Objections in which he found all of the Intervenor's objections to be without merit and recommended that they be overruled in their entirety and that the Board issue to Petitioner a Certification of Representative. Thereafter, on December 12, 1967, Intervenor-Respondent SIU filed with the Board a motion that these two cases be consolidated. Because neither of the other parties filed any objections to the Intervenor-Respondent's motion, and as the findings in the unfair labor practice proceeding effectively dispose of the issues in the representation case, the Board will treat the motion as constituting exceptions to the Regional Director's Report and Recommendations on Objections and hereby grants the motion and orders that Cases Nos. 23-CP-23 and 23-RC-2356 be, and the same hereby are, consolidated.

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[2] The Intervenor-Respondent's request for oral argument is hereby denied as the record in these two cases, including the exceptions and briefs, adequately presents the issues and the positions of the parties.

Pursuant to Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

In Case No. 23-CP-23, the Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in the case, and hereby adopts the findings,[3] conclusions, and recommendations of the Trial Examiner.

In Case No. 23-RC-2356, the Board has considered the Intervenor's objections, the Regional Director's Report and Recommendations on Objections, the Intervenor's exceptions to that Report, and the entire records in Cases Nos. 23-CP-23, and 23-RC-2356, finds the exceptions lacking in merit, and hereby adopts the Regional Director's findings and recommendations. Accordingly, we overrule the Intervenor's objections to the election. As a tally of the ballots indicates that a majority of the employees voted for the Petitioner, we shall certify it as the exclusive bargaining representative of the employees in the appropriate unit.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the

[3] We hereby correct the following minor errors in the Trial Examiner's Decision, which, however, do not affect his ultimate findings and conclusions: (1) the Trial Examiner stated that, prior to 1960, it appeared that one union represented all employees at Elevator B and the Wharves. The record in Case No. 23-RC-2356 relates that at least since 1953 more than one bargaining unit existed at Elevator B; (2) The Trial Examiner found that the Respondent ceased picketing the Employer's premises on January 5, 1965. The record reveals that although the injunction did not issue until January 5, 1965, Respondent ceased picketing the Employer's premises on December 18, 1964, pursuant to an oral court order.

Trial Examiner in Case No. 23-CP-23 and hereby orders that the Respondent, United Industrial Workers of the Seafarers International Union of North America, Atlantic, Gulf, Lakes and Inland Waters District, AFL-CIO, its officers, agents, and representatives, shall take the action set forth in the Trial Examiner's Recommended Order.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that the South Atlantic and Gulf Coast District, International Longshoremen's Association, AFL-CIO, has been designated and selected by a majority of the employees in the unit found appropriate in Case No. 23-RC-2356 as their representative for the purposes of collective bargaining, and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all employees in such unit for purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

Dated, Washington, D. C., April 12, 1968.

FRANK W. MCCULLOCH, *Chairman*
GERALD A. BROWN, *Member*
HOWARD JENKINS, JR., *Member*

NATIONAL LABOR RELATIONS BOARD

(SEAL)

TXD—658—67
Galveston, Tex.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

Case 23-CP-23

UNITED INDUSTRIAL WORKERS OF THE SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF LAKES AND INLAND WATER DISTRICT, AFL-CIO,

and

PORT RICHMOND ELEVATOR COMPANY, INC.

Robert G. Levy, II, Esq., and *Robert S. Breaux, Esq.*, of Houston, Tex., counsel for the General Counsel.

Joel Field, Esq., of *Shulman, Abarbanel & Kroner*, of New York, N. Y., for the Respondent.

L. G. Clinton, Jr., Esq., and *Carl William Vogt, Esq.*, of Houston, Tex., and *Murray H. Warschauer, Esq.*, of New York, N. Y., for the Charging Party.

TRIAL EXAMINER'S DECISION

Statement of the Case

John M. Dyer, Trial Examiner: United Industrial Workers of the Seafarers International Union of North America, Atlantic, Gulf, Lakes and Inland Water District, AFL-CIO,[1] herein called Respondent or the SIU, was charged by Port Richmond Elevator Company, Inc., herein called the Company or Port Richmond, with violating Section 8(b)(7)(C) of the Act, in that the SIU, not certified by the National Labor Relations Board, herein called the Board, picketed,

[1] The caption of the case and the name of the Respondent was amended at the hearing by dropping the phrase "Marine Allied Workers Division."

for more than 30 days, the premises of Elevator B, leased by Port Richmond, with an object of requiring Port Richmond to recognize it, and without the SIU filing a petition with the Board. It was charged that such picketing induced individuals employed by suppliers and others with whom Port Richmond did business not to make pickups or deliveries at its premises.

Respondent admitted a number of facts which make up the major portion of the General Counsel's case including that it was not certified by the Board and did not file a Board petition under Section 9(c) and picketed Port Richmond premises for more than 30 days with a purpose of securing recognition. It was not admitted that such picketing stopped deliveries or pickups. The SIU defends its actions on the ground that the National Mediation Board, herein the NMB, certified it for an appropriate unit of grain elevator workers and maintenance employees in Elevator B, when it was operated by the board of trustees of Galveston Wharves, Galveston Wharves herein, such predecessor being a carrier subject to the Railway Labor Act. The SIU maintains that Port Richmond is a successor company and should be bound by the NMB certification to which the Board should accord due weight. It is the SIU's contention that the Board's rules regarding successors embrace the situation here, despite the fact that the General Counsel of the Board dismissed SIU charges of 8(a)(1), (3), and (5) violations as not having merit. The SIU believes that the General Counsel did not view the situation properly and that it has an adequate defense to the charge if the facts demonstrate that a question concerning representation could not have been raised under all the circumstances.

All parties were afforded full opportunity to participate and to examine and cross-examine witnesses in the hearing which was held on July 18-21, 1967, at Galveston, Texas. All parties have filed extensive and thoughtful briefs which have been carefully considered.

Upon the complete record in this case and on my evaluation of the reliability of the witnesses based both on the evidence received and my observation of their demeanor, I make the following:

Findings of Fact

I. The Business Involved and the Labor Organization

Elevator B is a grain elevator located at Galveston, Texas, and is the only facility involved in this proceeding. This facility prior to August 1, 1964,[2] was owned and operated by the city of Galveston, Texas, in conjunction with wharf facilities at that port. In its operation of Elevator B as a public grain house, Galveston Wharves during the first 7 months of 1964 received gross revenues from its customers, who engaged in interstate and foreign commerce, in the approximate amount of $650,000.

Port Richmond, a New York corporation, is a wholly owned subsidiary of Bunge Corporation, and is engaged in the business of operating grain elevators in the States of Pennsylvania and Texas. The parent, Bunge Corporation, operates such facilities in New York, Texas, and Louisiana. Port Richmond, by virtue of a lease concluded on July 6, 1964, took possession of and thereafter operated Elevator B on and after August 1, 1964. During the period of August 1, 1964, to November 30, 1964, Port Richmond received revenues from its customers who were engaged in interstate and foreign commerce, in an approximate amount of $140,000.

Although initially responding that it believed Port Richmond to be a carrier under NMB jurisdiction, Respondent amended its position at the hearing, stating that by virtue of a determination by the United States Circuit Court of Appeals for the Fifth Circuit, it admitted that Port Rich-

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[2] All dates herein occurred in 1964 unless specifically stated otherwise.

mond was an employer within the meaning of the LMRA, and was engaged in commerce or an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act, and I so find.

Respondent admitted that it was a labor organization within the meaning of Section 2(5) of the Act, and I so find.

II. The Unfair Labor Practices

A. *Background and Issues*

The board of trustees of Galveston Wharves presumably had operated the wharves and Elevator B from the time they were built. It appears that prior to 1960, one union represented all the employees at Elevator B and the wharves, since a petition was filed by the SIU with the NMB in that year for a "craft or class of grain elevator workers and maintenance employees of the Galveston Wharves." Following an election, the SIU was certified for such a group on August 24, 1960. In 1962 the International Brotherhood of Electrical Workers, IBEW herein, petitioned the NMB for "craft or class of electrical workers" employed by the Galveston wharves. The March 28, 1962, NMB certification notes that the IBEW represented the electricians on the wharves and the SIU represented the electricians in Elevator B prior thereto. The NMB certified the IBEW as the representative of one unit of electricians for both the wharves and Elevator B.

The International Brotherhood of Longshoremen was supplanted by the International Longshoremen's Association and Local 1513, with which organization Galveston Wharves signed a 2-year contract running until September 30, 1964. This ILA contract, Respondent's Exhibit 13, sets out classifications, pay rates, hours of service, the assignment of work together with the number of men or the various types to be assigned for various jobs in what is called the "outside jobs" at Elevator B. The membership of the ILA local servicing this contract, which called for daily jobs

as assigned, consisted of Negro members and some few Mexicans. The SIU or "inside" unit consisted entirely of white employees.

In addition to the "outside" jobs under the ILA contract there were several oiler and cleanup jobs, essentially janitorial maintenance, which the ILA members performed inside the elevator.

Thus in July 1964 the "inside" or SIU unit consisted of some 15 classifications of employees who worked on an hourly rate of a normal workday of 8 hours and a normal workweek of 40 hours. The ILA contract providing hourly rates for some nine job classifications was on a call or day-to-day basis, with no guarantee of any set number of hours of work or days per week, with the exception of call-out time.

Jurisdictional lines were established by these contracts and the jobs specified . When we acknowledge the fact that the two units were identifiable by race, we see that the jobs also were so identified and as defined by the contracts, the promotional lines were thus closed. When the pay rates set forth in the two contracts are viewed, we further determine that the pay scale for the bulk of the ILA unit was more than the 10 percent lower than the pay rates for the bulk of employees in the SIU unit.

As a public grain house Galveston Wharves had five or six different customers, one of whom was the Commodity Credit Corporation operating under the Department of Agriculture. According to Galveston Wharves General Manager Devoy, *it was operating in a diminishing market and losing money.* It was decided to determine whether Elevator B could be leased to a commercial grain company and in June 1964, Devoy started making inquiries. The Bunge Corporation indicated an interest in the property and negotiations comemnced in early June culminating in agreement following negotiations on June 25 and 26. The lease was prepared and executed by Port Richmond, with Bunge as a guarantor, on July 2 and Galveston Wharves signed the agreement July 6.

While the negotiations were taking place, Murray Warschauer, secretary and general counsel of Port Richmond asked for and received copies of contracts Galveston Wharves had, including collective-bargaining agreements. On June 30, Devoy sent Warschauer a letter from Galveston Wharves' attorneys containing their opinion of the legal effect of the "successors and assigns" clause in the SIU contract, stating they felt that the SIU contract would not be binding on Port Richmond as a successor. In the July 2 letter to Galveston Wharves enclosing the lease, Warschauer stated that neither Port Richmond nor Bunge were undertaking any obligations or liabilities of Galveston Wharves not specifically contained in the lease, including any collective-bargaining agreements.

Galveston Wharves did not apprise any of the three unions that it was conducting lease negotiations, and on July 20, the SIU served it with a demand for reopening the contract which was due to expire September 30. Devoy directed that a notice "to all concerned" be posted.[3] On either July 29 or 30, attorneys for the SIU spoke to Warschauer on the telephone, informing him that the call constituted a "Section 6" notice under the NMB, and that the SIU-Galveston Wharves contract should not be amended in violation of that notice. Warschauer stated that neither Bunge nor Port Richmond were parties to that agreement.

On July 30, the SIU sent telegrams to Bunge and Port Richmond stating that a contract was in effect and existed

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[3] The notice read as follows:

> As you know certain business conditions warranted the leasing of Elevator "B" to the Port Richmond Elevator Co., Inc. Effective August 1, 1964, the Galveston Wharves will no longer operate Elevator "B".
>
> In accordance with provisions of ARTICLE XVI of our agreement notice of permanent lay off is hereby given to all employees represented by the Seafarers International Union. Effective date will be MIDNIGHT, JULY 31, 1964.

between them and requested that it be opened on wages and other issues including clauses regarding nonabolishment of jobs of SIU members and agreement by the SIU to any lease of the premises. Several hours later the SIU sent telegrams to Bunge and Port Richmond stating they would meet with them at the Galveston Wharves office on the following day. Bunge and Port Richmond apparently acknowledged receipt of the telegrams but denied being bound by the SIU contract.

The SIU struck the whole premises of Galveston Wharves on July 31. Attorney McLeod, representing *Galveston Wharves got a temporary restraining order against the SIU in a State court and the parties to the action agreed to limit the picketing to specific areas close to Elevator B.* Port Richmond was not a party to this proceeding, but filed CC and CD charges with the Board against the SIU on August 6. These charges were later dismissed and Port Richmond filed the instant CP charge on October 16. The complaint and notice of hearing issued on December 23, setting a hearing for March 1965. The SIU filed an 8(a)(1), (3), and (5) charge against Port Richmond on January 20, 1965, and, when this charge was dismissed in February 1965, appealed the dismissal to the General Counsel. The hearing for the instant case was indefinitely postponed at that time.

The SIU continued to picket the Port Richmond premises in 1964, and filed an action to enjoin consummation of the lease to Port Richmond, which was denied by the United States District Court for the Southern District of Texas. On appeal the United States Court of Appeals for the Fifth Circuit *held that after a timely demand the carrier (Galveston Wharves) had a duty to bargain with the SIU before putting a lease into effect which would suspend the carrier's operations and need for employees.* The court also determined that Port Richmond was not a carrier subject to the Railway Labor Act but was subject to Board Jurisdiction. As noted by the SIU, the circuit court has not ordered the lease unscrambled but has directed through the district court that suitable relief and sanctions be imposed so that bar-

gaining between Galveston Wharves and the SIU may proceed. There have been several successive actions in the district court and in the circuit court concerning these matters.

The parties stipulated that from July 31, until October 4, 1964 the SIU picket signs read:

United Industrial Workers of
North American

OF THE S.I.U. AFL—CIO
ON STRIKE

WE PROTEST THE *PERMANENT*
LAY OFF OF OUR MEMBERS
U.I.W. of S.I.U. of N.A. AFL—CIO

From October 5, until January 5, 1965, when the picketing ceased under the terms of the injunction sought and received on the basis of the charge in this case, the picket signs read:

> "On strike because Port Richmond Elevator Company refuses to bargain with the UIW of Seafarers International Union, AFL—CIO"

As noted *supra*, the SIU admitted a number of facts which make up the bulk of General Counsel's case. It admitted that it was not certified by the Board and had not filed a petition under Section 9(c) although it had picketed Port Richmond for more than 30 days with a purpose of securing recognition and bargaining for a craft or class of grain elevator workers and maintenance employees.

The remaining questions in this case are: (1) whether the picketing interfered with pickups and deliveries at Elevator B; (2) whether the Board should give full faith and credit to the NMB certification; and (3) whether Port Richmond is a successor to Galveston Wharves and the SIU unit appropriate, so that a question concerning representation could not have arisen.

B. *Effects of the Strike*

After the lease was signed, Port Richmond assigned Dan Delany to Elevator B to learn the operations and the flow of grain since he was to become the manager on August 1, when the lease went into effect. He and Harvey Hickman who was to become the officer manager began working at Elevator B during the latter part of July. Port Richmond got some other employees from other facilities it operated to survey the grain in the elevator and inventory the machinery and equipment.

After the picketing of Galveston Wharves was reduced to Elevator B, the SIU had pickets by the car dumps, the truck dump, and at the roadway near the entrance to Elevator B.

Office Manager Hickman testified without contradiction that during the strike, he had placed orders for various supplies and equipment which had not been delivered. As examples he cited: (1) an order for office furniture placed with the Fred F. Hunter Company. He observed the truck of this company approach the picket line, stop, then drive away. Thereafter he was told by Mr. Hunter that the drivers would not cross the picket line. (2) In mid-August a Central Motor Lines truck stopped at the picket line. Hickman and Delany spoke to the driver who said he would not cross the picket line to deliver a drum of fumigant. The drum was transferred to a Port Richmond truck and brought through the picket line by Port Richmond supervisors. (3) In September a Kelso Concrete Company truck stopped at the picket line. The Kelso driver refused to drive through the picket line and a construction worker engaged in work on the Port Richmond premises drove the truck onto the premises, removed the ready-mixed concrete and returned the truck to the Kelso driver outside the picket line. (4) A cartage truck delivering a 5000-gallon steel fumigant tank stopped at the picket line, the driver refusing to cross the line. Hickman and Delany rented a forklift truck and, accompanying the

cartage truck to a platform some distance from the picket line, transferred the tank and delivered it through the picket line. (5) A dinky locomotive ordered by Port Richmond arrived at the Galveston Wharves on a flatcar and sat on the tracks until supervisory personnel delivered it to Port Richmond a week or more later. Hickman was told by the yardmaster that Galveston Wharves employees would not deliver the locomotive through the picket line. (6) The Jupiter, a grain cargo ship, arrived in Galveston in early November 1964 for a cargo of grain from Elevator B. Hickman pursuant to instructions ordered longshoremen from Tex-Port Stevedoring Company and grain samplers from Galveston Wharves. Some 20 to 25 longshoremen from ILA Local 1513 appeared at the picket line at the time requsted but did not cross the picket line. A second call for longshoremen was placed by Hickman with Tex-Port but none crossed the picket line. Similarly no grain samplers crossed the picket line. Homer Warren, an SIU picket, stated he was on picket duty when the Jupiter was in port and saw the ILA longshoremen approach the picket line but did not see any of them cross the line. Not being able to load grain the Jupiter left Galveston for Houston. (7) Port Richmond received orders from customers to ship railroad cars of grain in August and September. Hickman ordered the cars from Galveston Wharves Yardmaster Sandall. Sandall told Hickman that Galveston Wharves employees would not move the cars through the picket line onto Port Richmond Tracks. A month or so later railroad cars were moved by Galveston Wharves supervisors to Elevator B.

In addition to these specific occurances at the picket line, Hickman testified that various companies from which he sought services for Port Richmond, such as Humble Oil, Air Express Company, Black Hardware, Dunn Equipment, Farmers Marine Works, and Electric Service and Supply refused to make pickups or deliveries while the picketing was in progress, informing Hickman he could pick up at their places of business or bring items to them for servicing.

After the picketing ceased these companies have made pick-ups and deliveries at Elevator B.

For the months of August, September, and October, Port Richmond shipped less than 5,000 bushels of grain. From November 1964 through January 1965 Port Richmond shipped less than 2 million bushels, while in the quarter ending April 1966 it shipped around 10 million bushels.

With the undisputed evidence of Hickman as buttressed by the testimony of Homer Warren, I conclude and find that the SIU picketing induced individuals employed by suppliers, service companies, railroads, carriers, and other persons not to make pickups or deliveries at Port Richmond's Elevator B premises at Galveston, Texas, or to perform services at such premises.

With the admissions noted before, this latter conclusion completes the evidentiary picture to find a *violation of Section 8(b)(/)(C)*. There remains the question of whether Respondent's certification from the National Mediation Board and the manner in which Port Richmond took over from Galveston Wharves create the legal conclusion that Port Richmond is a successor to Galveston Wharves so that no question concerning representation could be raised.

C. *The SIU Defense*

In its orginal decision in the matter, 368 F.2d 412, the United States Court of Appeals for the Fifth Circuit noted that the SIU argued two points as to Port Richmond; first that the NMB certification prescribed that the SIU was the bargaining representative for the specified employees of Galveston Wharves, its sucessors, or assigns (and that Port Richmond was in this category) and secondly that contemporary labor law developments indicated that successors should be held to the obligations of the predecessors. In answering these contentions the court said that it does not follow that where a carrier makes a lease of *limited duration* that the lessee inherits the contracts particularly where the lessee is not a carrier subject to the NMB. The

court stated that Port Richmond was not a carrier and was under the jurisdiction of the Board to which the SIU must look for any redress. The court further stated that the missing link of Port Richmond not being a carrier was the short answer to both of the SIU's contentions.

The SIU points to another part of the court's decision[4] and argues that the NMB certification should be given full faith and credit by the Board since it is a sister Federal agency designed by Congress to handle labor matters in a particular field and that there should be accommodation between the orders or certifications of the two. The SIU notes that the Board on occasion abides by the certification of State labor boards and argues that accommodation between Federal agencies would seem to be more compelling.

There had been no specific case prior to this time in which the Board decided to accept a certification by the NMB as valid and binding on it. Certainly if the Board decided to, it could do so, since both are Federal agencies established by Congress to guide labor matters in two specific areas found by Congress to need such. But there is another question brought to the fore here by the realities of the situation as they existed at Galveston Wharves, and that is whether the Board would be acting contrary to national policy as regards the existence of segregated jobs and working conditions, if it honored the 1960 NMB certification.

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[4] The court said that:

> . . . the very snarl these employees are in shows why an employer subject to the Railway Labor Act may have special obligations in pretermination bargaining. Suddenly from an action which is entirely legitimate and undoubtedly sound from an economic standpoint, employees of long standing find themselves with neither job nor representation continuity. In no small measure this is due to the mutual-exclusiveness of LMRA and Railway Labor Act. Surely through bargaining a way might be found to accommodate two congressional Acts, a single business operation and a labor force whose loyalty or competence has not here been criticized in the least.

The SIU unit at Galveston Wharves whether as a matter of historical accident or design consisted solely of white employees who had stable jobs at a better pay rate in the "inside" unit than did the predominantly Negro employees in the unstable ILA "outside" unit.[5] Insofar as this record shows there was no transferring or promotion between the two units.

Further, to accept the NMB certification for the "inside" unit would leave the NMB certification for the IBEW electricians unit in an awkward position since electricians are employed by Port Richmond and the old (1962) certification covered electricians at Elevator B and elsewhere on the premises of Galveston Wharves.

There is no thought that the question of segregated units was raised before the National Mediation Board, which was considered solely a question of craft or class of employees. But that issue is specifically raised here and must be conidered.

Considering the situation as it existed at Galveston Wharves, I conclude that the Board cannot accord full faith and credit to the NMB certification of the SIU unit, since if it did so under these circumstances, the Board would be acquiescing in the continuation of units whose chief distinction is one of race.[6] In effect then, the Board would be

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[5] The Galveston Wharves-SIU contract contained 15 job classifications receiving 5 different pay rates: 5 classifications received $3.15; 3 received $3.05; 3 received $3; 1 received $2.95; and 3 received $2.90.

The Galveston Wharves-ILA contract contained 9 job classifications which received 5 different pay rates: 1 received $3.15; 1 received $3; 2 received $2.85; 1 received $2.80; and 4 received $2.66.

[6] Charles R. Rouse, one of Respondent's witnesses who had been Texas floor chief in the SIU "inside" unit testified, "I told Mr. Kenner [executive vice president of Port Richmond] that we had belonged to the I.L.A. before. We wasn't satisfied the way we were treated. And those men had their union and we had ours, and I expected it to stay that way."

making or confirming a factual situation where *de facto* segregation units with unequal opportunities for employment and advancement existed.

Respondent then states that regardless of the certification, Port Richmond is a successor in a continuing industry and that the unit established prior is still the appropriate unit; that it represented the employees in that unit at the time the Port Richmond lease came into effect and should be recognized as the representative of the employees in that unit under Port Richmond.

Galveston Wharves operated Elevator B as a public grain house and Port Richmond continued that business with the distinction that Port Richmond had fewer customers and Port Richmond's main customer was its parent, Bunge Corporation.

While continuing the same basic business Port Richmond made a number of mechanical changes which increased efficiency and allowed it to operate with far fewer employees. It bought a dinky locomotive (switch-engine) which allowed it to move railroad cars up to and off the car dump, reducing the number of "cable pullers" by some 15 employees. It installed a fumigant tank and lines throughout the elevator which enabled it to pump fumigant throughout the elevator automatically. Formerly, employees carried 5-gallon containers throughout the elevator and dispensed the fumigant in the various bins. A number of motors and other equipment were refurbished, the grain spouts were relined, and late in 1966 the spouts were mechanized which eliminated more jobs. Port Richmond, after filling one sacking order, subcontracted sacking operations until it built a new sacking plant which enabled it to operate with fewer employees. All of these labor-saving devices which have been installed through the several years Port Richmond has operated the premises have enabled it to move substantially more

grain with fewer than 40 percent of the former complement of employees.

In addition to the mechanical changes, Port Richmond changed the job duties of a number of employees and did away with the day-to-day system under which the ILA "outside" unit worked. When it began hiring employees on October 8, 1964, Port Richmond hired for 8-hour, 5-day-a-week jobs in four pay classifications of Head Operator, Operator, Assistant Operator and Laborers. Various job duties or classifications were slotted in these pay classifications. Some jobs such as millwrights remained essentially the same. Most jobs had additional duties added, principally in cleaning the adjacent area. Some job titles and duties were eliminated such as truck scale clerk since Port Richmond anticipated few deliveries by truck and felt it could assign a millwright or other employee to perform the necessary work on the few occasions it happened.

The "outside" and "inside" jobs are now merged in one pay structure with uniform chances for advancement in the entire structure unimpeded by the old unit lines. The realignment of job duties and addition of such duties as cleaning to other jobs plus the switching around of employees where and when needed has allowed the work force to stabilize at approximately 50 full-time employees although there is some seasonal reduction in the work force.

Prior to the takeover on August 1, Port Richmond refused to allow its manager-to-be, Dan Delaney, to meet with the SIU for discussions, presumably about the hiring of the work force. As noted above the SIU struck on July 31 after receiving the permanent layoff notice from Galveston Wharves.

Port Richmond's Secretary and General Counsel Murray Warschauer requested a list of the former Galveston Wharves employees and received a list of some 121 names

on August 5. Oury Selig, who was in charge of labor relations for Galveston Wharves in July 1964, testified that a list of Galveston Wharves employees from both units was prepared and given to Attorney McLeod who represented both Galveston Wharves and Port Richmond at various times. Warschauer testified that a letter to the former employees was prepared on August 5 in Attorney McLeod's office and mailed that day. The parties stipulated that all of the employees in the SIU unit (some 40 or so) received the letter.[7] Some ILA members testified that they did not receive the letter, but considering that the ILA furnished

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[7] The letter sent by L. M. Warschauer to the employees was as follows:

> The employment policy of Port Richmond Elevator Company, Inc., at Galveston Elevator "B" which was prominently headlined and printed on the front page of The Galveston Daily News on August 4, 1964, is as follows:
>
> > "The Port Richmond Elevator Co., Inc., is accepting at the elevator office applications for employment from all prospective employees, including, of course, those formerly employed by the Galveston Wharves.
> >
> > "It will base hiring on the skill, ability and general knowledge of the applicant without regard to whether or not the applicant is affiliated with any union, and without regard to race, color or national origin.
> >
> > "The company presently has no employees at the elevator other than supervisory and clerical personnel and expects to hire its entire labor force from the skilled and experienced workers available in the Galveston area, at prevailing wages, hours and working conditions prevailing in the area.
> >
> > "In accordance with the National Labor Relations Act, the company is not permitted to discuss prospective employees or any other questions regarding employment with any union. The company will do so as soon as the law permits."
>
> Applications for employment are available at the Elevator office between 8 A.M. and 5 P.M.

employees on a day-to-day basis, this does not negate the testimony of Selig and Warschauer.

Applications were made available at the elevator and were distributed by the ILA among its members. From August 1 until October, Port Richmond had only supervisory and clerical employees on the premises of Elevator B. In early October interviews and physicals were given to applicants and employees were hired as of October 8. It is undisputed that only one of the total SIU complement filed an application and he was hired. Neither the remaining SIU members or the SIU have filed applications with Port Richmond since that time. Counsel for the SIU indicated that he felt that the SIU picketing constituted a job application but I am unable to so construe the picketing.

Apparently from the original layoff notice and the Port Richmond ads that appeared in the Galveston papers on August 4, Port Richmond had planned some hiatus in the operation of Elevator B. Delaney testified that insofar as he knew, the strike was the reason that Port Richmond did not begin hiring until October 8.

On August 1, the SIU by telegram gave notice to Bunge and Port Richmond that it was initiating a grievance concerning the "unlawful laying off" of the employees under the terms of article 10 of its contract. On August 13, by telegram, the SIU gave notice to Bunge and Port Richmond under Section 6 of the Railway Labor Act, that it requested opening of the contract which it claimed was in force since it considered Port Richmond a successor. Bunge and Port Richmond responded that they were not parties to the Galveston Wharves contract and were not bound by it.

The SIU feels that Port Richmond's refusal to meet with it prior to and after August 1 is indicative of a design to undermine the SIU's position as a bargaining represenative.

Port Richmond in its letter (footnote 7, above) states (apparently in fear of Section 8(a)(2) of the Act and not being covered by Section 8(f)) that it could not discuss

prospective employees with the Union. The letter also stated that it would base hiring on skill, ability, and the general knowledge of the applicant, without regard to affiliation with unions and without regard to race, color, or national origin.

In view of the racial situation as it existed in the former "outside" and "inside" units and with Port Richmond cognizant of this and of the fact that it (as of August 1) was holding grain for the Commodity Credit Corporation and would be expected to give guarantees of no discrimination in its contracts with the Federal Government, I will not presume that Port Richmond's policy was based on anti-union considerations and a desire to disenfranchise employees of their bargaining rights. The plain message of Port Richmond's letter is that it wished to operate in accordance with national policy and by following the course it undertook, it has done so.

In its brief the SIU claims that Port Richmond pursued an illegal course in attempting to keep SIU members from becoming Port Richmond employees. But Port Richmond did not instigate the strike or attempt to keep it in existence nor did it give orders not to hire employees from the SIU unit. It did the very opposite. It sought to end the strike by processing various charges and by letter (footnote 7, above) asked these former Galveston Wharves employees to apply for jobs with it.

In summary, although this is a continuing business in that Port Richmond continues to run a public grain elevator, there have been a number of changes. The principal customers have changed as have a number of the mechanical means of operating the business. The supervisory force has changed substantially as has the work force, principally because those in the former SIU unit did not file applications with the SIU and were not hired. The job content in a number of cases has been changed and three units of employees, two stable and one unstable, have been merged into one integrated stable work force with apparently equal pay

and opportunity for advancement which was not present before.

I conclude and find that the unit sought by the SIU is not an appropriate unit under all the existing circumstances and that a "Question Concerning Representation" could appropriately have been raised after Port Richmond began its operations at Elevator B.

A much shorter answer to this unit question could have been given by referring to the Board's recent decision (167 NLRB No. 90) in Case 23—RC—2356 involving Port Richmond, the ILA as petitioner and the SIU as intervenor. Many of the arguments concerning successorship and unit raised by the SIU were considered by the Board therein. The Board noting that the SIU charges of 8(a)(1), (3) and (5) violations against Port Richmond had been dismissed by the General Counsel, and taking cognizance of the previous composition of the units, stated: "In view of these foregoing circumstances and the disclosure in this record of the apparent demarcation of the former unit along racial lines, together with the change in operations which has resulted in a commingling of employee functions as between those working inside and those outside the elevator, we find the unit sought herein by the SIU to be inappropriate."

D. *Summary*

An even shorter answer to these proceedings would have been that Respondent was not certified by the Board nor did it file a petition within the allotted time under the LMRA. But I am not willing to state that the Board in other circumstances would not honor an NMB certification.

The Port Richmond successorship does not measure up to the tests, cited by Respondent in its brief, which Board Member Fanning spoke of in his speech, "The Purchaser and the Labor Contract—An Escalating Theory," of July 7, 1967. Therefore with the SIU's putative unit clearly inappropriate under these circumstances, I find and conclude

that Respondent, by its actions as set forth above, violated Section 8(b)(7)(C) of the Act.

III. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent as set forth in section II, above, occurring in connection with the operations of Port Richmond as described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

IV. The Remedy

Having found that the Respondent engaged in certain unfair labor practices as set forth above, I recommend that it cease and desist therefrom, and take certain affirmative actions designed to effectuate the policies of the Act.

Conclusions of Law

1. Port Richmond Elevator Co., Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Industrial Workers of the Seafarers International Union of North America, Atlantic, Gulf, Lakes and Inland Water District, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By picketing Port Richmond Elevator Co., Inc., from on and after July 31, 1964, until January 5, 1965, without filing a petition under Section 9(c) of the Act within 30 days of the commencement of said picketing, with an object and purpose of forcing and requiring Port Richmond Elevator Company, Inc., to recognize and bargain with Respondent as the collective-bargaining representative of Respondent's employees, at a time when Respondent was not certified as such representative, and at a time when a

question concerning representation could legitimately be raised under Section 9(c) of the Act, Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(7)(C) of the Act.

4. The unfair labor practices herein found affect commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

On the basis of the foregoing findings of fact and conclusions of law and upon the entire record in this case, considered as a whole, it is recommended that United Industrial Workers of the Seafarers International Union of North America, Atlantic, Gulf, Lakes and Inland Water District, ALF-CIO, its officers, agents, successors, and assigns, shall:

1. Cease and desist from picketing or causing to be picketed or threatening to picket, Port Richmond Elevator Company, Inc., where an object thereof is to force or require such employer to recognize or bargain with Respondent as the collective-bargaining representatives of its employees, in circumstances violative of Section 8(b)(7)(C) of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Post at the respective business offices and meeting halls of Respondent, copies of the attached notice marked "Appendix."[8] Copies of said notice on forms provided by the Regional Director for Region 23, after being duly signed by a responsible representative of the Respondent, shall be posted by such Respondent immediately upon receipt

[8] In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(b) Furnish to the Regional Director for Region 23, signed copies of said notice for posting by Port Richmond Elevator Company, Inc., if willing, in places where notices to employees are customarily posted. Copies of said notice to be furnished by the Regional Director, after being signed by the Respondent, shall be forthwith returned to the Regional Director for distribution by him.

(c) Notify the Regional Director for Region 23, in writing, within 20 days from the date of this Recommended Order, what steps Respondent has taken to comply herewith.[9]

Dated at Washington, D.C.

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[9] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL MEMBERS OF UNITED INDUSTRIAL WORKERS OF THE SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES AND INLAND WATER DISTRICT, AFL-CIO AND TO EMPLOYEES OF PORT RICHMOND ELEVATOR COMPANY, INC.

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

Following a trial in which the SIU, Port Richmond Elevator Company, Inc., and the General Counsel of the National Labor Relations Board participated and offered evidence, it has been found that we violated the law and we have been ordered to post this notice and to abide by what we say in this notice.

We will not picket, or cause to be picketed, or threaten to picket, Port Richmond Elevator Company, Inc., where an object of such picketing is to force or require Port Richmond to bargain with the SIU as the bargaining representative of its employees, in circumstances violative of Section 8(b)(7)(C) of the Act.

UNITED INDUSTRIAL WORKERS OF THE SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES AND INLAND WATER DISTRICT, AFL-CIO
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If members and employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 6617 Federal Office Building, 515 Rusk Avenue, Houston, Texas 77002, Telephone 228-0611.

FILED
APR 28 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 1212

BOARD OF TRUSTEES OF THE GALVESTON WHARVES and THE CITY OF GALVESTON, TEXAS,
Petitioners,

v.

UNITED INDUSTRIAL WORKERS OF THE SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICT, MARINE ALLIED WORKERS DIVISION, AFL-CIO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1212

BOARD OF TRUSTEES OF THE GALVESTON WHARVES and THE CITY OF GALVESTON, TEXAS,

Petitioners,

v.

UNITED INDUSTRIAL WORKERS OF THE SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICT, MARINE ALLIED WORKERS DIVISION, AFL-CIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Questions Presented

1. Whether the Fifth Circuit's affirmance of the District Court's Order, restraining petitioner-carrier from availing itself of a Texas state court injunction that was issued pursuant to a Texas statute regulating public employer-employee labor relations, and barring respondent-union from picketing the carrier's premises, was necessary, in accordance with 28 U.S.C. § 2283, "to protect or effectuate" the District Court's judgment ordering collective bargaining pursuant to the Railway Labor Act, 45 USC § 156.

2. Whether the Fifth Circuit, as part of its Order to restore the status quo so that collective bargaining might go forward as required by the Railway Labor Act, correctly ordered the District Court to award backpay to the thirty-four employees who lost their jobs because the carrier breached its statutory duty to bargain.

Reasons for Denying the Writ

A. The Injunction Against the Carrier's Use of the State Court Injunction Is Warranted by 28 U.S.C. Sec. 2283, Because the State Court Injunction Conflicts with the District Court Order Mandating Collective Bargaining Between the Parties Under the Railway Labor Act.

The State court injunction in this case was granted pursuant to Art. 5154C of the Texas Revised Civil Statutes [1] which governs the conduct of public employees and employers in Texas. The only real question presented below, and sidestepped in the Petition, was whether this employer, because of its twin roles as a political subdivision of the state of Texas as well as a common carrier by rail under the Interstate Commerce Act, is governed in its labor relations with these employees by the Railway Labor Act or by conflicting Texas law. The law is crystal clear that petitioner's labor relations with these employees are controlled by the Railway Labor Act; it concedes this much. The law is equally clear that Texas law governing public employee

[1] Article 5154C provides: "It is against state public policy for its officials or those of its political subdivisions to bargain on contract with a labor organization concerning terms and conditions of employment of its employees. Public employees are prohibited from participating in an organized work stoppage or strike under penalty of losing civil service and other rights acquired as a result of their public employment. Employees may individually work without penalty and may present their grievances through a representative that does not claim the right to strike. No person shall be denied public employment because of membership or non-membership in a union."

relations, such as the statute on which the state court injunction was based, is not only irrelevant to these relationships but that any Texas court injunction based on that state law could only have the effect of thwarting the orderly processes of collective bargaining mandated by the federal statute.

Three scholarly decisions of the Fifth Circuit, embodying the views of no less than eight of its judges have held and reaffirmed that this carrier-petitioner flagrantly flouted its duty to bargain with respondent-union, both in failing to give notice of its intent to lease the subject facility and in failing to bargain on the union's demand pursuant to Railway Labor Act, § 6, that bargaining proceed on this point. That Court three times now [2] has ordered the District Court to fashion suitable relief so that federally required bargaining might go forward as envisioned by the federal statute.

As part of implementing this statutory scheme the Circuit affirmed the District Judge's restraint of the carrier pursuant to § 2283, 28 U.S.C., from availing itself of a state court injunction that it had procured by convincing a Texas judge that these labor relations were governed by Texas Stat. Art. 5154C. The effect of this outstanding state court injunction, as both the District Judge and the Fifth Circuit recognized, was to evaporate the compulsion to bargain contained in these Fifth Circuit decisions, the District Court orders, and required by the federal statute.

---

[2] The first time the Circuit reversed the District Court's characterization of this dispute as "minor," held that the carrier breached its statutory bargaining duty, and ordered the imposition of "suitable relief and sanction" citing two backpay cases. App. p. 20a. The second time the Court reversed the District Judge's refusal to award backpay and sent it back for an Order that would put these employees "substantially in the same position as if Galveston Wharves had complied with the Act" again citing backpay cases. App. pp. 35a-36a. The third time it just squarely held that backpay is a necessary component of an Order purporting to remedy breach of bargaining duty. App. pp. 72a-87a.

The heart of the issue is simple, indeed: what constraint is there on a carrier to bargain to agreement when it knows the union has no weapons at its disposal? The Railway Labor Act indisputably, and contrary to the inapposite Texas statute, preserves the union's right to self-help as part of the federal statutory scheme for achieving industrial peace by a balancing of bargaining power. Our argument is thus that what the federal act gives, Texas cannot take away. In this case disarming the union emasculated the District Court's bargaining order; the carrier could posture its way to impasse knowing full well the union had no economic recourse.

Thus on the obvious and fundamental issue § 2283 clearly is authority for the District Court to act to protect and effectuate its bargaining order. And as to this issue, as well as the peripheral issues raised in the petition, we respectfully submit that the learned opinion of the Fifth Circuit, reproduced as pages 87a-94a of Appendix H, so carefully traverses the arguments that we need only add a brief comment.

The Fifth Circuit's conclusion on the fundamental issue is supported by this Court's recent decision in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 37 U.S.L. Week 4247 (March 25, 1969). That case involved two issues immediately germane to this case. The first was the propriety of a Florida State Court injunction against what the carrier had characterized as unlawful secondary activity by the union; the Florida Circuit Court agreed with this characterization in addition to finding that the secondary picketing constituted a violation of the State's restraint of trade laws. 37 U.S.L. Week at 4248. The second issue concerned the preemptive effect of the Railway Labor Act in an area, unlike that involved in the present case, that is not clearly regulated by the Federal Act. As this Court said, the Railway Labor Act is "silent" on the question of secondary activity, and on whether a state may

act "to impose whatever restrictions it wished on the parties' use of self help". 37 U.S.L. Week at 4250. On this latter issue this Court concluded "that the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes." *Ibid.* The Court's reasoning as to the permissible range of state jurisdiction over relationships otherwise governed by the Railway Labor Act, over the State's ability to prescribe what is permissible and what is non-permissible picketing is discussed as follows:

> ". . . The disputants' positions in the course of negotiation and mediation, and their willingness to submit to binding arbitration or abide by the recommendations of a presidential commission, would be seriously affected by the knowledge that after these procedures were exhausted a State would, say, prohibit the employees from striking or prevent the railroad from taking measures necessary to continue operating in the face of a strike. Such interference would be compounded if the disputants were—as they frequently would be—subjected to various and divergent state laws. Railway (and airline)* labor disputes typically present problems of national magnitude. A strike in one State often paralyzes transportation in an entire section of the United States, and transportation labor disputes frequently result in simultaneous work stoppages in many States.
>
> "The Railway Labor Act's entire scheme for the resolution of major disputes would become meaningless if the States could prohibit the parties from engaging in *any* self-help. And the potentials for conflict, see Building Trades Council v. Garmon, 359 U.S. 236, 249, 250, 43 LRRM 2838 (1959) (concurring opinion), and for the imposition of inconsistent state obligations, cf., Clearfield Trust Co. v. United States, 318 U.S. 363 (1943), are simply too great to allow each State which happens to gain personal jurisdiction over a party to a railroad labor dispute to decide for itself what economic-self-help he may or may not

* Footnote omitted.

> pursue. The determination of the permissible range of self-help 'cannot be left to the laws of the many States, for it would be fatal to the goals of the Act' if conduct were prohibited by state laws 'even though in furtherance of the federal scheme. The needs of the subject matter manifestly call for uniformity.' Machinists v. Central Airlines, Inc. 372 U.S. 682, 691-692, 52 LRRM 2803 (1963)." 37 U.S.L. Week at 4250-51.

In the course of its discussion as to the basis for *federal* determination of the permissible scope of secondary activity under the Railway Labor Act, this Court made it unmistakably clear that federal law preempts the field, that is, that although a State court may have jurisdiction over the parties and the subject matter, it must apply *federal* and not state law. This was precisely this Court's holding in *California* v. *Taylor*, 353 U.S. 557 (1953) on facts strikingly similar to the case at bar, and it is precisely this view that informed the Fifth Circuit's opinion when it stated:

> "[E]conomic action after exhaustion of Section 6 procedures is an integral part of the collective bargaining scheme Congress prescribed when it enacted the Railway Labor Act. The effect of the state court injunction against a possible Union strike is perhaps to render impotent the duty to bargain imposed by this Court,* Texas and Texas courts may not agree with this view, but when the Railway Labor Act is otherwise applicable—as it is here—the Texas view is irrelevant. For the Railway Labor Act preempts all state legislation purporting to regulate the labor relations of covered employees.[34]"[3]

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* Footnote omitted.

[3] The Court's footnote was

> "[34] For example, in the field of grievances—of minor disputes—neither a state nor a federal court has jurisdiction to determine matters of contract interpretation. *Order of Ry. Conductors* v. *Southern Ry.*, 1950, 339 U.S. 255, 70 S.Ct. 585, 94 L.Ed. 811 *Slocum* v. *Delaware, Lackawanna & W. R.R.*, 1950, 339 U.S. 239, 70 S.Ct. 577, 94 L.Ed. 795; *Order of Ry.*

Thus the Fifth Circuit anticipated this Court's holding in *Jacksonville Terminal,* by holding that federal law controls this case in its entirety to the exclusion of Texas law.

The *Jacksonville Terminal* dissent and majority would agree on this issue, in the case at bar. The dissent in *Jacksonville Terminal* only disagreed with the majority's conclusion that *secondary activity* fell within that area of labor relations barred to state jurisdiction despite the Act's silence on the matter. All of the Justices would agree, however, that a state has no jurisdiction whatever to regulate activity that *is* indisputably controlled by the Railway Labor Act, namely, the lawful *primary* activity of the union during the course of statutory bargaining procedures (37 U.S.L. Week at 4250). The Texas statute, and the injunction obtained thereunder interferes with the union's right to strike or picket whenever it would otherwise be free to do so within the federal scheme, a scheme "specifically touched" to use Justice Douglas' language. 37 U.S.L. Week at 4256, thus interfering with that federal scheme and therefore directly in conflict with the federal labor policy. To quote the Fifth Circuit again, basing itself on just that precise point made in this Court's earlier opinion in *California* v. *Taylor,* 353 U.S. 553 (1957):

> "In *California* v. *Taylor,* 1957, 353 U.S. 553, 77 S. Ct. 1037, 1 L.Ed. 2d 1034, the Carrier owned and operated by the State of California, contended that the minor disputes provisions of the Railway Labor Act were inapplicable to it and that its labor relations were specifically regulated under state statute. The Supreme Court replied:

Conductors v. *Pitney,* 1946, 326 U.S. 561, 66 S.Ct. 322, 90 L.Ed. 318. It is equally clear that federal, not state, law applies to awards of system boards of adjustment, which are enforceable only in federal courts. *International Ass'n of Machinists* v. *Central Airlines,* 1963, 372 U.S. 682, 83 S.Ct. 956, 10 L.Ed. 2d 67."

> 'Under the Railway Labor Act, not only would the employees of the Belt Railroad have a federally protected right to bargain collectively with their employer, but the terms of the collective-bargaining agreement that they have negotiated with the Belt Railroad would take precedence over conflicting provisions of the said civil service laws. 353 U.S. at 561, 1 L.Ed. 2d at 1039.'
>
> "The Court squarely held that the Railway Labor Act applied to state-owned carriers. Said the Court: 'The fact that under state law the employees of the Belt Railroad may have no legal right to strike reduces, but does not eliminate the possibility of a work stoppage. It was to meet such a possibility that the act's "reign of law" was established.' 353 U.S. at 566." (App. H, pp. 89a-90a)

Petitioners argue that there is no need to enjoin enforcement of the Texas injunction, even if it is based on inapplicable law, since, so the argument goes, the union here can't strike anyway until bargaining is over, and at that point, there is time enough for an appeal from the Texas injunction. This is just too facile. First, there is the fundamental point that no bargaining, in any meaningful sense, will take place until the carrier knows the union can strike if impasse is reached, or if it violates its duty to bargain in good faith. Thus, the carrier will only posture its way to impasse until the carrier knows that the union means business. It hardly behooves this carrier that has, for almost five years now, demonstrated an incredible resourcefulness in avoiding its bargaining obligation, to ask for another round of meaningless talks on the assumption that it will act in good faith even though it knows the union is impotent. The respondent-union knows better. So did Congress. That is why the right to strike and picket is part and parcel of the Railway Labor Act's major disputes procedures. See *Jacksonville Terminal, supra,* at n. 24, 37 U.S.L. Week at 4253. And that is precisely and specifically why the Texas Court injunction must be put by or it will pose an ineluctable obstacle to the District Court's bargaining order.

Secondly, the union may have the right to strike before bargaining is over. In fact, and as the Fifth Circuit pointed out (App. H, p. 91a) at the very time that the Texas injunction was issued, the carrier was itself in breach of the statute, and the union would have been free under the applicable decisions, to attempt to bring the carrier to the table by picketing. (App. H, p. 91a.)

See also, *Florida East Coast R.R.* v. *Brotherhood of Locomotive Engineers,* 362 F.2d 482, 486 (5th Cir. 1966).

Of course, petitioner's argument that the Fifth Circuit's order amounts to an order to the union to strike is just downright absurd; nowhere is that notion in the case. There is no warrant either to give credence to the idea that no injunction should issue since the union should be relegated to an appeal through the Texas courts, and, then ultimately to this Court for relief. This really is ineffable gall. Here is a carrier that, in the caustic words of the Fifth Circuit, posted a notice in "language which must be rare indeed in the contemporary history of railroad labor relations" (App. C, p. 16a), that it just would not have anything to do with the union in response to the union's Section 6 notice. It committed a flagrant violation of its duty to bargain both in failing to give the union an opportunity to bargain on its notice, or in failing to respond to the union's request to bargain. Both of these breaches are beyond dispute and are now the law of the case. (See App. E, p. 34a.) Thirty-four employees have been without their jobs for almost five years now as a result of this statutory violation. And despite this history, and a record of nothing but dilatory tactics and evasive maneuvers, the carrier must believe this Court is credulous indeed to believe that it will meet and "bargain" with this union even though the union is at the bargaining table with its hands tied by an utterly unjustified and illegitimate state court injunction.

They are, in effect, urging this Court that they be allowed to manipulate the Texas courts for another few

years, hoping that in the uncertainties of litigation they will *never* have to confront this union where the Railway Labor Act says that they must confront it and where they should have confronted it five years ago—either at the bargaining table or on the picket line. And as long as they think that the union can't do anything about it, they will meet *pro forma*, but with no intention of coming to an amicable settlement. That is why Congress wrote an economic weapon into the arsenal of a union's bargaining rights under the Act and it is also precisely why this respondent has to be free of any lurking restraint when it comes to the table. That is why the Fifth Circuit was so eminently correct when it said:

> ". . . The Union's right to bargain, guaranteed by the Act, 45 U.S.C. § 152, Fourth, and presently enforced by this Court, would be illusory without a right to strike when bargaining has run its course or if the Carrier continues to refuse to bargain. The Railway Labor Act, and the cases interpreting it, only forbid Union striking during the course of exhaustion of the Act's procedures (and during the statutory cooling-off periods after initiation of the proceedings, 30 days after mediatory efforts have failed, and after creation of an Emergency Board and thirty days thereafter). The right to strike is adjunct to the Union's statutory rights and implicit in our order. . This national labor policy cannot be frustrated by a state court injunction. To effectuate the judgment of the federal court, the district court properly enjoined the Carrier from availing itself of the state court injunction. If the Union is to be enjoined from picketing in the future, it must be enjoined under the Railway Labor Act, not under article 5154c of the Texas statutes; and it is to be enjoined in federal, not state, court". (App. H, 94a.)

We respectfully submit that once the preemption point is clear, petitioner's tortured approach to § 2283 falls of its own weight. If ever there was a case when a § 2283 injunction is necessary to "protect" and "effectuate" a federal court judgment this is it.

Petitioner strains to conjure up a "conflict" with the decisions of this Court in construction of Sec. 2283, by relying, as it did in the Fifth Circuit, on *Amalgamated Clothing Workers* v. *Richman Bros.*, 348 U.S. 511 (1955). Actually, this is as tenuous as the rest of their arguments. The Fifth Circuit distinguished the *Richman* case, relying instead on this Court's opinion in *Capital Service Inc.* v. *NLRB*, 347 U.S. 501 (1954) and we reproduce those two paragraphs because they dispel the carrier's argument so effectively:

> "Galveston relies upon *Amalgamated Clothing Workers* v. *Richman Bros.*, 1955, 348 U.S. 511, 75 S.Ct. 452, 99 L.Ed. 600. The Court in that case, however, specifically recognized that 'In no lawyer-like sense can the present proceeding be thought to be in aid of the District Court's jurisdiction.' 348 U.S. at 519, 99 L.Ed. at 609. The district court simply did not have jurisdiction over the matter in controversy; it had remanded the state cause when first removed to federal court. The court's non-existent jurisdiction therefore cannot be aided.' *Ibid.*
>
> "More in point is *Capital Service, Inc.* v. *NLRB*, 1954, 347 U.S. 501, 74 S.Ct. 699, 98 L.Ed. 887, a leading case on the 'in aid of jurisdiction' exception. A state court had enjoined all picketing arising from a labor dispute; the federal court enjoined only that which violated the National Labor Relations Act. The Board, to cure the conflict and enforce the injunction obtained pursuant to Section 10(1) of the Act, moved to enjoin the employer from giving effect to the state court order. The district court granted the stay as necessary in 'aid of its jurisdiction'. The Supreme Court granted relief under Section 2283, observing that the federal court must '. . . have unfettered power to decide for or against the Union, and to write such decree as it deemed necessary in order to effectuate the policies of the Act. . . . [To do so] it must be freed of all restraints from the other tribunal. 347 U.S. at 505, 506, 75 S.Ct. at 702-03." App. H, p. 90a.

In sum, petitioner is reaching desperately in this aspect of its argument. Federal law preempts the field of collec-

tive bargaining, if as here, the Railway Labor Act is applicable. Petitioner does not confront that issue in its petition. It relies instead on the sophistry of an alleged conflict with earlier decisions of this Court—a point adequately rebutted in the Fifth Circuit's unanimous opinion on that issue, and the notion that the § 2283 injunction is unnecessary to protect the District Court order compelling bargaining. Common sense, let alone the decisions, dictates that the bargaining order would be rendered useless by the outstanding state court injunction; the union would not have the leverage the federal act gives it. Of what significance, then, would the federal order to bargain to be? The answer is obvious. The carrier would like nothing better than to have the union now relegated to more perilous seas of litigation, this time in the Texas courts. However, § 2283 provides a remedy for the carrier's disingenuous manipulation of the state courts to avoid its incontestable duty to bargain under the Federal Act. It is within the plain meaning and intent of § 2283 for that relief to have issued in this case. There is nothing in the petition to warrant a grant of the petition on this Point.

B. The Fifth Circuit's Backpay Order Is An Integral Part of The Restoration of the Status Quo Mandated By Section 6 of the Railway Labor Act and Is Entirely Consistent with the Decision of This Court in *Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas R.R.*, 363 U.S. 528 (1960).

As we pointed out above the carrier committed a flagrant breach of its duty to bargain in this case. Not only did it not give the union representing these employees the requisite Section 6 notice announcing its intent to lease the grain elevator at which the affected 34 employees had long been employed, but it refused to meet or discuss the matter when the union itself served, properly, a section 6 notice of its own to put the matter on the bargaining table. In this way, the carrier breached its duty to bargain under the Railway Labor Act. This was the square holding of the

first Fifth Circuit opinion in this case, rendered almost four years ago on September 14, 1965. The bargaining order, and the mandate to fashion suitable relief and sanctions short of literal restoration of the status quo which would have meant "unscrambling" the lease was contained in that decision. (See App. H, 71a-72a.) The characterization of this case as one involving a "major dispute," and all the remedies radiating from that characterization was finalized in that first opinion. It is well past the time for the carrier to question that at this late stage, four years, many briefs and two additional Fifth Circuit opinions later. As the Fifth Circuit itself said on the second round before it:

> "[1] We observe, *in limine*, that the main thrust of appellee's argument on this appeal and cross-appeal, and reiterated in its post-argument supplemental brief, is that this court's prior opinion was erroneous, and that we should therefore review and revise the conclusions therein reached. Our previous ruling is the law of this case and will not be reconsidered on this second appeal. *Hildreth* v. *Union News Company*, 6 Cir. 1963, 315 F.2d 548." (App. E, p. 34a)

The time to appeal the characterization of this dispute as a "major dispute" to this Court has long since run.

The only issue, then, that is timely appealed to this Court via the petition is the propriety of the Fifth Circuit order to the District Court not to send the backpay issue to the System Board of Adjustment established by the parties' contract, but to decide the issue and make the award itself. The award of backpay in this case was found by the Fifth Circuit to be necessary to compel compliance with the status quo requirements of Section 6 of the Act. (See App. H, pp. 78a-79a.)

To have compelled literal compliance with the Railway Labor Act's status quo requirements would have required the Fifth Circuit to have ordered the "unscrambling of the lease" and the restoration of these employees to their

jobs just as if the statutory duty had never been breached. Obviously under such a situation the employees, in order to be made whole for the damage they suffered because the carrier violated its statutory duty, would be entitled to receive backpay for the period during which they did not have their jobs.

What the Fifth Circuit did do was to order restoration of the status quo short of a complete and literal return in order to avoid doing some injustice to the carrier, by ordering only that the employees be put back to work pending the completion of bargaining, that the carrier bargain as if the statute had never been violated, and that it pay the employees whatever they lost as a result of the statutory violation. This was the remedy for the statutory violation that took place here, and which violation itself is no longer an issue. The Fifth Circuit's explanation is utterly sound:

> "Backpay is a realistic assurance that there will be 'an impact on the duty to bargain to prevent the employer from getting a windfall from having violated the Act, while protecting the employees' benefits against the lapse of time.' 368 F.2d at 413. Only backpay will put the employees 'substantially in the same position as if Galveston Wharves had complied with the Act.' Ibid." (App. H, 79a).

As the Court further elaborated:

> ". . . As we have noted, however, the purpose of the relevant sections of the Act is maintenance of the status quo pending conference. The employees wrongfully laid off cannot be retroactively reinstated, but they can be retroactively compensated. This does not punish the Carrier. Nor does it constitute a windfall to the employees. It is the price of reconstructing the status quo; it compensates the employees for the losses incurred by their being laid off in violation of the Act." (App. H, p. 77a).

The carrier makes two arguments against the court-ordered back pay award in its petition: one is that the

order conflicts with other Circuit decisions; the second is that the decision will "result in repeated conflicts between the federal courts and administrative tribunals," resulting in "double-standards" and "forum shopping." (Brief for Petitioner, p. 24). Neither argument withstands scrutiny.

The order in no way conflicts with any Circuit's decisions. This alleged conflict is manufactured by petitioner by contrasting the uniform decisions of this Court and the Federal courts on wrongful discharge cases with the case at bar which has nothing at all to do with wrongful discharge, but with remedying a breach of the statutory bargaining duty and its concomitant status quo requirement. A wrongfully discharged employee may elect either to recover damage for wrongful discharge via a suit for breach of contract, see *Walker* v. *Southern Ry.*, 385 U.S. 196 (1966), or else go to the appropriate adjustment board for reinstatement and back pay. But the Fifth Circuit recognized the difference between these cases and the case at bar:

> "... We acknowledge that a disciplinary discharge in *breach of contract* is remediable either before the appropriate adjustment board or, upon the employee's election, in a damage action [18] where permissible under state law in state or, if diversity exists, in federal courts. But the employees here do *not* claim backpay for a breach of contract. Their claim arises out of a violation of the federal statute. The contract-dispute cases therefore are not relevant." (App. H, p. 80a) (Emphasis in original).

As the Fifth Circuit also pointed out (App. H, p. 80a) no administrative agency has jurisdiction over this matter. Thus the "imaginary horrible" of conflict conjured up by petitioner is pure fantasy. The contract between these parties, Article X, provides for the establishment of a system board of adjustment having jurisdiction of "disputes growing out of grievances or out of the interpretation or application of agreements ..." (App. H, p. 80a, fns. 19 and 21). This is not a dispute concerning the contract,

or a grievance, but a "major dispute" concerning the restoration of the *status quo ante* the carrier's breach of its statutory obligation bargain pursuant to RLA § 6. An arbitrator would not have the authority to grant backpay in this case since the claim does not arise out of a dispute concerning the agreement, and he would thus be exceeding his contractual and statutory authority to make such an award. *Gunther* v. *San Diego R.R.*, 382 U.S. 257 (1965); *International Ass'n of Machinists* v. *Central Airlines*, 372 U.S. 82 (1963); *United Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960). What possible conflict, then, between courts and administrative agencies would be created if a Federal Court made an order that no administrative agency, let alone a contractually established arbitration tribunal, would have the authority make?

Petitioners intone sorrowful litanies about the novelty of the backpay remedy. But ample authority for a judicially ordered restoration of the *status quo*, including a backpay award has been available for some time. In *Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas R.R.*, 363 U.S. 528 (1960), a District Court conditioned its grant of an employer requested injunction against a union strike over what was concededly a "minor dispute," upon the employer's maintenance of the status quo pending resolution of the dispute by the National Railroad Adjustment Board, *or*, in the alternative, payment of the affected employees if the contested changes were put into effect in advance of the Board's determination. In short, the District Court told the employer, in a "minor dispute" situation, that if the changes sought to be effectuated would have a serious dislocating impact on the employees, a District Court could, as a matter of equity, condition the use of its powers against them on employer maintenance of the status quo *or* interim payment of the affected employees. Now this was done in a "minor dispute" situation, as to which the statute contains no express status quo requirement and when the union strike threat was patently illegal (*Brotherhood of R.R. Trainmen* v. *Chicago River & Indiana R.R.*, 535 U.S. 39 (1957)). *A fortiori* in a "major dispute"

case, involving breach of § 6 of the Act, a section that expressly requires the carrier to maintain the status quo during bargaining, the power to order backpay is not a matter of equitable discretion, but of statutory command.

Since there is no administrative agency established under the Railway Labor Act to remedy what would be an unfair labor practice if it occurred under the LMRA, it is the courts that must fashion the remedies fashioned by the NLRB under the companion federal labor statute. That has been the case since this Court affirmed the power of a federal court to compel bargaining, without a prior administrative finding, in *Virginian Ry.* v. *System Federation #40,* 300 U.S. 515 (1937); also: *Texas & N.O. R.R.* v. *Brotherhood of R.R. Clerks,* 281 U.S. 548 (1930). Cf. *Jacksonville Terminal Co., supra.*

In conclusion, then, the remedy of awarding backpay for breach of the duty to bargain does not conflict with the decision of any other Court, but is, in fact, entirely consonant with this Court's decision in *M-K-T, supra,* as well as with the law under both the Railway Labor Act and the LMRA (see App. H, p. 77a). Moreover, it creates no conflict, or potential conflict between judicial and administrative tribunals, since there is no administrative tribunal that has jurisdiction to award backpay for breach of statutory duty under the Railway Labor Act. All that remains of petitioner's argument then is that courts may encounter some difficulty in working out the details of a backpay award. But the Federal Courts have been fashioning remedies for unfair labor practices under this Act since its inception; there is guidance from the decisions of the NLRB and the courts in implementing the self-same remedies under the LMRA. See App. H, pp. 81a-82a. Parker, *Monetary Recovery Under the Federal Labor Statutes,* 45 Texas L. Rev. 881 (1967); Cf. *Jacksonville Terminal,* 37 U.S. L. Week at 4251. Also, it is quite premature for the carrier to itemize all the grievances that it may have due to an absence of fair consideration of all the issues, because the backpay order itself has not yet been fashioned. It will

be time enough for an appeal if, after a hearing, the order that is fashioned does the carrier harm. At this stage of the litigation the only real issue is the propriety of a back-pay award as part of the restoration of the *status quo ante* the statutory breach, and on that question the Fifth Circuit was entirely sound.

Conclusion

The petition does not raise any issues meriting this Court's review. The issues raised by the petitioner's attack on the § 2283 injunction are camouflage for its attack on the Railway Labor Act's preemption of the law in this case. This is an attack the carrier cannot raise in a frontal assault, because all the decisions subvert its argument. The issue has been disposed of conclusively in *California v. Taylor, supra,* and this Court's recent opinion in *Jacksonville Terminal, supra.* And the protection of the Federal Court's Order to bargain is effected by restraining interference from a Texas injunction that was designed to impede full freedom of the parties under the controlling Federal Act. Petitioner's second point is equally disingenuous since there is, in fact, no administrative agency with competence to decide the backpay issue and since the remedy itself is so plainly mandated by the Act's *status quo* provisions as well as long established Federal labor policy. For these reasons the petition for certiorari should be denied in its entirety so that these thirty-four employees may finally avail themselves of the benefits of the Railway Labor Act.

Respectfully submitted,

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